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UNIVERSITY OF CALIFORNIA
DEPARTMENT OF HISTORY
BERKELEY, CALIFORNIA

THE ESTABLISHMENT OF STATE GOVERNMENT
IN CALIFORNIA

A Thesis submitted in partial satisfaction
of the requirements for the degree of
Doctor of Philosophy
at the University of California

by

Cardinal Goodwin.

Approved

Herbert E. Bolton

E. J. McLaughlin

H. Morse Stephens

Thomas H. Reed

**THE ESTABLISHMENT OF STATE GOVERNMENT
IN CALIFORNIA**



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THE ESTABLISHMENT OF
STATE GOVERNMENT
IN CALIFORNIA

A THESIS SUBMITTED IN PARTIAL SATISFACTION OF
THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
AT THE UNIVERSITY OF CALIFORNIA

BY

CARDINAL GOODWIN

MAY, 1916

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THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA

1846—1850

BY
CARDINAL GOODWIN, M. A.

UNIV. OF
CALIFORNIA

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1914

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MY WIFE

MILDRED SMITH GOODWIN

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PREFACE

THIS work covers the period in California history from 1846 to 1850. In the introductory chapter I have attempted to trace, briefly, and in a very general way, the extension of American influence over the territory from an early date to the completion of the conquest. This is followed by a more detailed account of the period of military rule and the political unrest resulting therefrom. The work of the Convention of 1849 and the election, organization, and important enactments of the first Legislature have been given due consideration. Chapter eighteen deals with the admission of California into the Union, and in the final chapter will be found some statistics on the population and resources of the new state in 1850.

The general impression that a group of southern politicians dominated the Convention of 1849 is contrary to fact as may be seen. The extensive eastern boundary was not supported by southern men any more than by northern, and the exclusion of the free negro was a question in which the man from the northern states was interested as much as the man from the South. The State Legislature, however, did finally send two proslavery men to represent California in the Senate of the United States.

The panic of 1837 had its effect on the revision and forma-

tion of sections in state constitutions dealing with corporations and banks. This has been treated, briefly in so far as other states of the Union are concerned, and somewhat more fully in the case of California. The sources of the Constitution of 1849 have been traced. These will be found to be more extensive than has been supposed generally.

Space will not permit me to name all who have so kindly assisted me in this work. Special mention is due the authorities of the Academy of Pacific Coast History, Berkeley, California, for courtesies extended to me in the use of the Bancroft Collection; to Mr. Frank Jordan, Secretary of State, and to Mr. Ed. L. Head, Keeper of the State Archives, for permitting me to use the original copies of the election returns; to Mr. J. L. Gillis, State Librarian at Sacramento, and his assistants, not only for kindnesses extended while there, but for forwarding documents and data from time to time at my request; and to Major Edwin T. Sherman, Oakland, California, for permitting me to use his *Reminiscences*, MS., a document here cited for the first time. My classmate, Mr. George McMinn, now of the University of California, read the manuscript and in many ways improved it by his suggestions and criticisms. Miss Dorothea M. Melden assisted me in comparing the manuscript with the typewritten copy, and I am under deep obligation to my wife for invaluable aid rendered in many ways.

Especially do I wish to extend my thanks to Prof. Herbert E. Bolton of the University of California. It was at his suggestion that I began the work a little over a year

ago, and to his friendly advice and criticism is due largely whatever merit the volume may possess. He is in no way responsible, however, for any mistakes which may be found herein.

CARDINAL GOODWIN

STOCKTON, CALIFORNIA.

MARCH 6, 1914.

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ESTABLISHMENT OF STATE GOVERN- MENT IN CALIFORNIA

CHAPTER I

INTRODUCTION: AMERICAN INFLUENCE ¹ AND THE CONQUEST

THE American conquest of California began during the period when that territory was occupied by Spain. Looking back from the pinnacle of the present we can see that the event was perceptible from the beginning, and that every incident which brought the American and the Spaniard together was a factor in the movement. The captains of American ships who smuggled goods into California ports, the United States sailors arrested and thrown into confinement by Spanish authorities, the contraband trade with Franciscan friars, all of these played a part in the conquest. As early as 1804, William Shaler, captain of the *Lelia Byrd*, said that the Spaniards had removed every obstacle from the path of an invading enemy; and had "stocked the country with such multitudes of cattle, horses and other useful animals" that it would be impossible to destroy or remove them. A number of defenceless inhabitants, he continued,

¹ The best piece of work done on the American influence in California during the period preceding 1850—Cleland, *The Interest of the U. S. in California during the years 1835-46*—is still in manuscript form. Its publication will be a real addition to the material on California history.

2 STATE GOVERNMENT IN CALIFORNIA

who had been spread over the territory, could not be expected to act as enemies against invaders who should treat them well. Nothing was needed but a good government to enable California to assume an influential and important position in the commercial, industrial, and political world. And closing the paragraph with probably the first published hint of a conquest, he says, "It would be as easy to keep California in spite of the Spaniards as it would be to wrest it from them in the first place."¹

A Beginning

The Spanish laws forbade the Californians to trade with foreigners, and even the presence of the latter in the territory had to be explained satisfactorily to his Majesty's officials. But despite these provisions, which were urged ever more strenuously by the Spanish officers in Mexico as California developed, American sailors and traders continued to make their appearance along the coast. Sometimes ships loaded with Boston merchandise, having secured permission to anchor at San Diego or Monterey under the pretence of much needed repairs, would quietly distribute their cargoes among the natives and sail away. Or again they might enter a secluded harbor without permission and exchange commodities clandestinely with the padres, who were invariably eager to trade their mission

¹ Shaler, *Journal of a voyage between China and the Northwestern coast of America*, made in 1804. In *American Register, or General Repository of History, Politics, and Science*, pt. I for 1808, III, 137-75.

produce for such merchandise as they could get. In fact a dire necessity compelled them to depend on foreigners for subsistence. When Eayrs, captain of the *Mercury*, was taken with his ship in 1813 at El Refugio for illicit trade with the natives, he offered in his defence the fact that Spanish officials resident on the coast encouraged him in it. He claimed that it was at their request that he had given them agricultural tools and other things which they needed. "I have provided the priests with what they required for instructing the natives and for the ceremonies of religion. They have paid me with provisions and some few otter-skins. I have clothed many naked, and they have given me in return products of the soil, as the officers of this district can inform your Excellency." ¹

And on the 12th of November, 1819, Argüello wrote as follows to Viceroy Calleja:

"The padres are concerned in illicit trade from a grave and general necessity of clothing and other materials which they have experienced in the past, and experience more and more from day to day in the jurisdiction of this government. A rule of canonical law says, 'necessity makes lawful that which by the law is illicit.' " ²

¹ Richman, *California under Spain and Mexico*, 205-06.

² *Ibid.*, 207. Ch. X of this work is my principal authority for trade relations. A longer account may be found in Bancroft, *History of California*, II, ch. 13; and III, ch. 5. In fact, my principal authorities for this chapter are Richman and Bancroft.

Spanish Fear

There can be no reasonable doubt that little or no hostility was felt by natives for Americans under the Spanish régime. There was practically no reason for such feeling. But this in itself may have tended to make Spain uneasy. The reports of the governors indicate that the officials in California became more nervous as American visits increased. In 1817 Sola urged large reënforcements for the territory. Particularly did he warn his superiors against Americans. They were becoming too familiar, he said, with the natural richness and with the defenceless condition of the country. It was well known that their purpose in coming was not merely to obtain supplies, and that smuggling even was not their sole aim. They came well armed, and they frequented the smaller bays and mingled with the people. Naturally the Indians could not be expected to defend the country, he continued, because they believed the Spaniards had deprived them of their liberty.¹

A little later official uneasiness began to manifest itself in another form. Rumors of actual American invasion were spread. In September, 1821, a report was current that foreigners were fortified somewhere within forty or fifty leagues of San Francisco. Just where, no one pretended to know, but it was generally supposed to be somewhere southeast of San José. Sola organized a force, collected supplies from various missions, and on the 18th of October the organization left San Francisco under the command of

¹ Bancroft, *History of California*, II, 214-15.

Argüello with the avowed intention of dislodging the strangers. A tedious march through the San Joaquin and Sacramento valleys, the occasional firing of cannon to frighten hostile Indians, and the drowning of a mule with two thousand cartridges on its back were the results of this farcical expedition.

Such was the situation in 1822 after Mexico became independent. The Americans had become acquainted with the California coast region, they had mingled with the natives, they had smuggled thousands of dollars' worth of Yankee merchandise to Spanish priests and Spanish presidios, and they had spread a fear of Americans among Spanish officials.

American Influence Increases

With the independence of Mexico a change occurred in the attitude of that government's officials toward foreigners. California ports were opened to foreign trade upon the payment of duties averaging, at first, about twenty-five per cent. Later, however, all ports except Monterey and San Diego were closed, and the duties were increased to forty-two and one-half per cent. But Yankee ingenuity soon contrived schemes for evading Mexican regulations. One method, practised by the more timid, was to tip the custom officer. Another was to leave a part of the cargo in a secluded place near the port of entry, pay duties on the remainder, reload during the night, and the following day dispose of the entire shipment. If there were several loads

of goods to be sold, the wily trader had still another way of evading the custom officer. One ship would boldly enter the harbor, pay duties on her entire cargo and remain anchored for several days selling goods, the supply being kept up by other vessels transferring their loads of merchandise into her hold during the night. Thus several ship-loads of goods could be sold for the duties paid on one. John R. Cooper, William A. Gale, Nathan Spear, Bryant and Sturgis, and other Bostonians carried on trade in this manner for years. In many cases the natives knew what was being done, and not infrequently the Mexican officials must have been aware of it, but the necessity of trade on the part of the Californians, the profits to the smuggler, and the American love of adventure which accompanied it, led to a constant increase in this form of traffic.

With the arrival of Jedidiah Smith in 1826, Americans began to come into California overland. The following year Mexico took steps to prevent further immigration. General orders were forwarded to Echeandía to expel all foreigners from the territory who were not provided with passports, to keep a strict watch and render a monthly account of new arrivals, to grant no lands to them, and by no means to allow them to form settlements on the coast or islands. Attempts were made to enforce these orders, but this did not prevent the extension of American influence. In 1828 bands of American trappers along the frontiers excited no little apprehension among Mexican officials. And in the following year there was a revolt of the troops at Monterey (caused by destitution), led by Joaquin Solís, a convict,

who had been banished to California from Mexico. The whole affair was of slight importance, but it is significant that Americans were influential in having all the prisoners released a short time after the revolt had been put down. The next year, 1830, Mexico showed her willingness to make slight concessions to foreigners already in the territory. In reply to petitions for land made by a few Americans, the governor of California was authorized to make such distributions to foreigners as the laws would permit, but he was ordered to see to it that the Russians and Americans should be the least numerous and that they should be located in the central parts. Such timid measures as Mexico enacted however, had little effect. Americans continued to carry on contraband trade and to assist in overthrowing and setting up governors. In 1831, when the revolution against Victoria developed, Abel Stearns was one of the leaders in the movement; and during the following year, while the struggle for the governorship between Zamorano and Echeandia was in progress, forty-one foreigners at Monterey, a large number of whom were Americans, banded themselves together in support of Zamorano. The authorities in Mexico, in the meantime, appointed Figueroa to the governorship of the territory and sent him out with instructions to encourage colonization of both citizens and foreigners. Figueroa's appointment united the factions temporarily.

From this time until the revolution of 1836, Californians probably felt no more prejudice against Americans than against Mexicans. The commercial benefits they had conferred and still were conferring, won the favor of the

people and even of the authorities, while such dangers as they excited troubled the former none and the latter but little. The Americans who lived regular lives found little or no difficulty in procuring citizenship, wives, and land. To be sure there were certain formalities with which newcomers had to comply, but there seem to have been no cases of oppression recorded. "Tired of Mexico,—her Victorias, her Chicos, her Cholos and her tariff,—and eager for a rule of native sons, the American theory of government appealed to Californian leaders, padres no less than politicians!"¹ And by 1836 they were ready to put their theories into practical operation.

An Attempt at Independence

Until this time the part played by Americans in the political affairs in California had not been an especially active one. As we have seen, they had been participants in the struggle for the governorship between Zamorano and Echeandía in 1832, but this was done to protect their business interests at Monterey rather than to assist Zamorano. In 1836, however, we find them organizing for offensive purposes. It was in this year that the young Californians, led by Juan Bautista Alvarado, a leader of the "native sons," and assisted by a band of about thirty riflemen, the most efficient of whom were Americans, determined to do in California what had been done in Texas by Sam Houston and other Americans a few months earlier. The ruling governor,

¹ Richman, *California under Spain and Mexico*, 299-300.

Gutiérrez, was driven from power, and on the 6th of November, California was declared independent of Mexico. On the 7th, Vallejo was made commandante-general of the new state, and just one month later Alvarado became governor. The *disputacion*, or State Congress, passed a decree dividing the land into two cantons, that of Monterey and that of Los Angeles. This was on December 9th. In each place there was to be a *jefe politico*—at Monterey the governor himself, and at Los Angeles some one to be appointed by the governor from a *terna* elected by the Angelinos. Discontent and persistent revolution in the south finally induced Alvarado, however, to abandon his scheme for independence. Castillero became his representative at Mexico, and on the 9th of July, 1837, Alvarado attempted to circumvent his enemies by declaring in favor of uniting with the parent state. In the meantime, however, the Mexican government appointed Carlos Carrillo governor. Alvarado refused to recognize the new appointee and again mustered his forces. Carrillo was defeated and taken prisoner, and a little later, August the 13th, Alvarado received word that he had been recognized as governor by Mexico.

In all the early part of this struggle, the Americans were influential. "Foreigners, with interested motives and sound arguments, labored to prove that California had received nothing but neglect and ill treatment from Mexico."¹ It was doubtless due to pressure brought to bear by Americans after Gutiérrez had been defeated that an attempt at absolute independence was undertaken. There is evidence

¹ Bancroft, *History of California*, III, 449.

that the Americans had a "lone-star flag"¹ all ready which they wished to hoist, and that they were desirous of placing California under the protection of the United States. The latter scheme was never carried out, however, because David Spence and other foreigners deemed it wise to curb American ambition. Disgusted with the whole affair, the Americans withdrew from active participation in the revolution.

During the next few years the Americans were comparatively quiet, but the mere fact that in 1840 the governor felt it necessary to arrest secretly forty Americans and send them to Mexico to be tried for a supposed uprising against the government, indicates that their influence had become paramount in the territory.² Every attempt made to counteract it brought out the fact that it had become a permanent, growing element with which the officials would have to deal more leniently and more considerately as the years passed.

The next incident that brought any great number of Americans into active participation in California affairs occurred a few years later. When Manuel Micheltorena succeeded Alvarado as governor in 1842, he brought with him from Mexico a company of soldiers composed of ex-convicts. They were habitual thieves, and the ever increasing loss sustained by the people of the territory became so unendurable at the last that a revolt developed under the leadership of Alvarado. Sutter and Graham, for personal

¹ Mofras, *Exploration de l'Oregon, des Californies, etc.*, I, 300.

² The Graham affair. See Bancroft, *History of California*, IV, ch. 1.

reasons, collected a company of one hundred riflemen and joined Micheltorena. In fact the governor was compelled to place his reliance almost entirely on the foreigners. The hostile forces met in the region north of Los Angeles. With Alvarado there were also a few Americans under the command of William Workman and Benjamin Wilson. When the latter learned that their opponents were also their countrymen they communicated with them and a mutual agreement was reached whereby the Americans on both sides withdrew from the contest. Shorn of his principal strength Micheltorena promptly capitulated.

This was in February, 1845. A few months later, in July, the Mexican government instructed the governor "to prevent the introduction of families from the Missouri and Columbia rivers, as otherwise the general order of the department would be subverted, foreign relations complicated and embarrassment created." An attempt was made to enforce this order. The task was not made easier by the appearance a little later of John C. Frémont with about sixty armed followers. He made his camp at Hartwell's rancho in the Salinas valley, and on March 5, 1846, was ordered by Prefect Manuel Castro to retire beyond the limits of the department. This Frémont not only refused to do but fortified himself on Gavilán peak and raised the United States flag. After having been menaced by Castro with two hundred men and warned against treachery by Larkin, the United States consul at Monterey, Frémont withdrew slowly toward Oregon. In the meantime Sub-Prefect Francisco Guerrero sent word to Larkin that the

former would notify the authorities in each town to inform Americans who had bought land—a right of naturalized foreigners only—that the transactions were invalid and that they themselves were subject to expulsion at any time.

It is not surprising that these things created considerable excitement, especially among American settlers. Reports were circulated and generally believed that Mexican officials were preparing to drive all foreigners from the country. In April, 1846, Larkin wrote "of rumors that Castro was collecting people to force settlers from the Sacramento!"¹

The Bear Flag

The general unrest was not relieved by the sudden reappearance of Frémont from the north. He had been overtaken on the borders of Oregon by a naval officer, Gillespie, with "dispatches" from Washington. Upon his sudden arrival naturally the settlers believed he had been ordered to return by the United States government. Very soon after Frémont had established his camp at the junction of Bear and Feather rivers, about a dozen of his men, under the command of Ezekiel Merritt, seized one hundred and seventy horses that were being sent south to General José Castro by Vallejo and which rumor declared were to be used to free the land of foreigners and to establish a fort on Bear river. On the same day, June 11th, "it was decided to capture Sonoma, where, under Vallejo, nine small cannon and two hundred muskets constituted a kind of presidio." Merritt,

¹ Richman, *California under Spain and Mexico*, 306-09.

with twenty followers, increased later by twelve or thirteen under the command of Dr. Robert Semple and John Grigsby, made his appearance before Vallejo's house at dawn on the 14th of June. "A capitulation, embracing Vallejo, his brother Don Salvador, and his secretary Victor Prudon, was drafted and signed, and, stimulated by liberal refreshments, the Americans withdrew." The capitulators were sent to Frémont, who, though disclaiming any part in the Sonoma affair, gave orders for the arrest of Jacob Leese (the latter accompanied the prisoners as interpreter), and for the confinement of all in Sutter's Fort.¹

At Sonoma, in the meantime, William B. Ide, who had assumed command, was busy inditing proclamations and establishing "a just, liberal and honorable government." A flag was constructed with a single star in the upper left hand corner, a bear in the center, and the words "California Republic" printed across the bottom. Ide declared it to be his aim to establish a government that should secure civil and religious liberty; "insure security of life and property; detect and punish crime and injustice; encourage virtue, industry and literature; foster agriculture and manufactures, and guarantee freedom to commerce."

The appearance, however, of Commodore Sloat on the 7th of July, 1846, put an end to all schemes for establishing a California republic. He had reached Monterey on the

¹ The Bear Flag revolt has been treated of course in all the California histories of the period. I have followed Richman's account, pp. 309-12, supplemented by Hunt, *Legal Status in California*, 1846-49, pp. 63-64, and his *California the Golden*, p. 177.

2nd. Larkin, however, persuaded him to delay action for five days, at the end of which time he disembarked two hundred and fifty men, raised the American flag over the custom house, fired a salute, and posted a proclamation declaring California annexed to the United States. Two days later, July 9th, the flag was raised at San Francisco and Sonoma, and on the 11th at Sutter's Fort. On the 23rd Sloat turned over his command to Commodore Robert F. Stockton and six days later sailed for home.

Stockton, in accordance with the terms of his proclamation, proceeded to drive Pico and Castro from the southern part of the territory where they had taken refuge. Frémont's men were accepted as a battalion of volunteers with Frémont himself as major and Gillespie as captain. These troops were sent to San Diego, where they arrived on the 29th of July, and raised the United States flag. Meantime Stockton moved southward with three hundred and sixty men and Frémont's troops came northward from San Diego. The two forces met in Los Angeles on the 13th of August, neither of them having experienced any serious opposition. The flag was raised and the conquest was deemed complete.¹

The Californians had been comparatively passive spectators of all that had occurred. It was more than a month later, September 24th, that the indignation aroused by the treatment meted out to Vallejo,—a native Californian—and his followers at Sonoma, led to a general uprising of his countrymen, and by that time steps had been taken at

¹ Richman, *California under Spain and Mexico*, 319-20.

Washington to insure a speedy and permanent annexation of California to the United States.

Official Schemes at Washington

As early as 1835 President Jackson had ordered Butler, *chargé d'affaires* in Mexico, to purchase the Bay of San Francisco as a port for the numerous United States vessels engaged in the whaling business on the Pacific coast. The price to be paid, according to one authority, was \$5,000,000. There is some indication that the proposition might have been favorably received had it not been for the opposition of the British. A few years later, when the diplomatic relations between the United States and Mexico were becoming more complicated over Texas, Commodore Thomas Catesby Jones was sent to take command of the Pacific squadron. His instructions ordered him to "afford . . . every aid, protection and security consistent with the law of nations," to Americans and American interests on the Pacific coast. Doubtless he also had verbal instructions from the secretary of war which were to govern his actions provided certain contingencies should arise. Anyway, under the impression that war had begun between the United States and Mexico, Jones entered the harbor of Monterey on the 19th of October, 1842, and took possession of the town. Two days later, having been convinced that the relations between his country and Mexico were peaceable, he restored the Mexican flag, withdrew his troops, fired a salute and, after a brief delay, sailed away.

On March 4th, 1845, James K. Polk became President. His policy of territorial acquisition was determined when he came into power. The minister, sent to Mexico to adjust the boundary between the United States and that country, was further authorized "to purchase for a pecuniary consideration Upper California and New Mexico." The amount to be paid was of secondary importance. The President thought these two territories might be had for fifteen or twenty million dollars, but he was ready to pay forty million if necessary.¹

The relations between the two governments became even more strained during the first months of Polk's term, and in May, 1846, war began. By June the President had expressed a desire to get possession of all the territory north of the twenty-sixth degree of north latitude in the treaty of peace with Mexico.² At the suggestion of Benton a regiment of volunteers was raised to go from New York to California with the understanding that they should be mustered out of service in the latter place after the war was over.³ According to orders sent out from Washington to Colonel Stevenson of New York City, the regiment was to consist of men of various pursuits and regular habits.⁴ The object is obvious.

General Stephen Kearny had been sent into New Mexico with United States troops as soon as war was declared.

¹ Polk, *Diary* for September 16, 1845.

² *Ibid.*, for June 30, 1846.

³ *Ibid.*, for June 20, 1846.

⁴ See the letter from Secretary of War Marcy to Colonel Stevenson dated June 26, 1846, in Niles' *Register*, Vol. LXX, pp. 344-45.

Having completed the subjugation of that territory by August, he was ordered to proceed from Sante Fé to California. He arrived at Warner's ranch on the 2nd of December, 1846.

As already indicated the conquest was deemed complete the previous August. Later developments showed, however, that so far as war affected the subjugation of California, the real struggle did not begin until September. On the 24th of that month Gillespie, whom Stockton left in command of the south with orders to maintain martial law, suddenly found that his indiscretionary measures had stirred up a revolt which rapidly spread over the southern part of the territory. On September 30th, Gillespie was forced to accept the terms Florés offered him and withdraw from the south. Meantime the messenger sent northward by the besieged commander reached Commodore Stockton, and the latter moved southward, arriving at San Diego by November. While here he received a letter from General Kearny. To meet the General and conduct him to San Diego, Stockton sent Gillespie (Gillespie had joined Stockton at San Pedro) with thirty men. On December 6th, after the union of these troops with Kearny's, the battle of San Pascual was fought, an engagement that came near proving disastrous to the Americans. A few other minor skirmishes resulted in the triumph of the American cause, and on the 10th of January, 1847, the stars and stripes were permanently raised at Los Angeles.

CHAPTER II

THE PERIOD OF MILITARY RULE

IN the meantime attempts were being made at Washington to provide a government for California. In his orders of June 3, 1846, to Kearny, Secretary of War Marcy wrote, "Should you conquer or take possession of New Mexico and Upper California or considerable places in either, you will establish temporary civil government therein—abolishing all arbitrary restrictions that may exist, so far as it may be done with safety." Officers who proved themselves to be friendly to the United States were to be retained in their positions, and their salaries were to be provided from import duties. These were to be reduced so as to provide a fund just large enough for the purpose.¹ In his report to the President dated December 5th, Marcy recommended the establishment of "courts-martial or some military tribunal, to be organized by the general in command" and vested by express provisions of law with authority to try offences committed in any of the conquered territory where criminal courts, except those of the enemy, were not provided.² The secretary of the navy, in a confidential letter to Commodore Stockton, dated November 5th following, said the administration of the government in California would be placed in charge of

¹ *California Message and Correspondence*, 1850, 238; H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 5-7.

² H. Ex. Doc., 2nd sess., 29th Cong., No. 4, 55-6.

the chief commander of the land forces while the establishment of port regulations would be left to the superior naval officer.¹

On December 8, 1846, President Polk, referring in part to these orders, notified Congress that steps were being taken to establish "temporary governments in some of the conquered Provinces of Mexico, assimilating them as far as practicable to the free institutions of our own country."² Immediately after the message was read in the House, Garrett Davis of Kentucky expressed dissatisfaction with certain parts of it, and offered a resolution requiring the President "to communicate to this House any and all orders or instructions to General Taylor, General Wool, General Kearny, Captain Sloat, Captain Stockton or any other officer of the government, in relation to the establishment or organization of civil governments in any portion of the territory of Mexico which has been or might be taken possession of by the army or navy of the United States;" also what forms of government had been established and whether the President had approved and recognized such governments.³ The speaker decided that the resolution, according to the rules of the House, must lie over one day,⁴ and it was accordingly brought forward as the first business to be considered on Wednesday, December 9th.⁵ Before voting on the resolution, however, members of the House took occasion to

¹ Cutts, *Conquest of California and New Mexico*, 259.

² Richardson, *Messages and Papers of the Presidents*, IV, 494.

³ *Cong. Globe*, 2nd sess., 29th Cong., 12.

⁴ *Ibid.*

⁵ *Ibid.*, 13.

express their opinion on the legal status of the conquered territory. It will be interesting to consider two or three of these before examining the documents submitted by the President as requested in the above resolution.

Congressional View as to Legal Status of Conquered Territory

Davis, in commenting on the resolution after he had submitted it, said that when he saw foreign countries occupied by the United States army and navy and heard officers of the United States proclaiming themselves governors of provinces, appointing subordinate officers, fixing their salaries and the duration of their offices,—establishing, in a word, the whole machine of civil government,—he demanded of the President his authority for permitting and sanctioning such a course of proceeding. “What!” he exclaimed, “was our American President an emperor, sending forth his Agrippa and his Marcellus as his proconsuls, to establish and govern the provinces they might conquer by force of arms?” He admitted that the President was the commander-in-chief of the army and navy, but he denied that this permitted him to exercise any authority in the establishment of civil government in conquered territory. He wanted to know from the President and “his partisans by what imperial or regal authority his majesty undertook to act in the premises referred to in the resolution of inquiry.” If the chief executive had usurped so much power, then he “was ready for ulterior measures.” ¹

¹ *Cong. Globe*, 2nd sess., 29th Cong., 13.

On the other hand, Douglas of Illinois did not agree. In the war with Mexico, he said, some of her provinces had been conquered, and as a result the Mexican government could no longer exercise authority there. It was therefore the duty of the conqueror to establish a government of some kind in place of that which had been overturned. Under the law of nations it was the right of the conqueror to do this. "Had our generals not taken it upon themselves to perform an act of such obvious necessity in protecting the rights of a conquered people, as far as those rights were in conformity with the rights of our own government, there would have been much more propriety in the honorable gentleman's threatening 'ulterior measures'." The government established in this way, however, would be a military and not a civil government. It would be such a government as might be established by a conquering general over a conquered country as a result of a successful prosecution of a legal war. Such a government was military in its origin and in its maintenance, but it might also relate to civil and municipal as well as to matters purely military. It was bound to see that justice was administered to the conquered inhabitants and that their rights and privileges were duly respected until Congress should appoint another in its place. The only question which Congress should consider was whether the commanders of the United States army had been prudent and wise in exercising their authority.¹

Rhett of South Carolina thought that if the country conquered formed part of the United States, "then clearly the

¹ *Cong. Globe*, 2nd sess., 29th Cong., 13-14.

President had no right to organize in it any territorial government." But the territories of New Mexico and California did not belong to the United States. It was true that the United States held military occupation of them, but this very fact itself indicated the status of the conquered provinces. They were held by the military forces of the United States and were subject to the control of those forces. "If the President commanded them at all he was a satrap—he was a despot, so far as they were concerned: he wielded his power over them by the sword, and enforced it by the sword alone. . . . Congress might, . . . judge of the morality of his acts; but so far as the law of nations was concerned, he had a legal right to do his pleasure." ¹

Perhaps the sanest argument on the subject was made by Seddon of Virginia. He differed with Douglas because he did not believe that the territory of a foreign nation with whom the United States was at war, when seized and completely subjugated, was to be regarded as part of the United States. If this were true the military authorities could no longer exercise power over it. The territory would be subject to the existing laws of the United States, "and the inhabitants, having become citizens, be entitled to all the rights and privileges whether of property, person or representation, which are secured and guaranteed to our citizens by the constitution and laws of the Union." Nor could he agree with Rhett that conquered territory was to be held "by the mere power of the sword, with the right of arbitrary despotism." "The wholesale operation of civil

¹ *Cong. Globe*, 2nd sess., 29th Cong., 15.

institutions must oftentimes even yet, amid the fiercer energies and more unbridled powers invoked and demanded by the stern necessities of war, be checked and restricted, and many mere civil or municipal laws be disregarded or swept away." But the rule of absolute brute force, "tempered only by such instincts of humanity as may survive in the bosom of a relentless commander," should not be permitted. The progress of civilization had produced a code of law which governed international relationships, "founded in part on the practices of nations but more correctly binding as deduced from the most sacred principles of justice, and the highest ethics of morality and humanity." This code recognized by all nations would not permit the establishment of a military despotism over a conquered people. It was true that the inhabitants of a conquered territory, just as soon as they submitted, were under obligation to render obedience to the conqueror, the latter thus taking the place of the sovereignty previously governing them. On the other hand, it was the sacred duty of the conqueror to secure to the conquered, "so far as compatible with the safety of his conquest and army," all their rights of property and enjoyment of civil institutions and the regular administration of justice. To continue martial law would be revolting to the just principles of the law of nations. After all opposition had been put down, justice and humanity required the establishment of provisional civil government in New Mexico and California by the commanders of the United States troops there. To censure the President, therefore, for ordering the establishment of such a government in

these provinces would be censuring him for doing his duty.¹

Such were the principal views held by members of the House of Representatives in regard to the attitude which the government at Washington should assume toward the conquered provinces before the war ended. Seddon's opinion was the opinion held by the administration, as may be seen by comparing his views with the orders sent out by the secretaries of the war and navy departments quoted above.

Papers Submitted by the President

The resolution offered by Davis passed the House in a slightly modified form on December 15th.² On the 22nd President Polk sent a message accompanied by the requested documents.³ A very small part of the contents of these documents deals with the "establishment or organization of civil governments" in territory conquered from Mexico. They are divided into two parts. The first contains twenty-four communications consisting of letters, orders, proclamations, and a copy of the organic law for New Mexico. Of the one hundred and eleven pages of the document, fifty-one are devoted to the organic laws for the establishment of civil government in New Mexico. The second part contains fourteen somewhat similar communications from the navy department. In three of the letters of the first group ref-

¹ *Cong. Globe*, 2nd sess., 29th Cong., 23-26.

² *Ibid.*, 33; H. Ex. Doc., 2nd sess., 29th Cong., Doc. No. 19, 1; Richardson, *Messages and Papers of the Presidents*, IV, 506.

³ These may be found in Doc. No. 19, H. Ex. Doc., 2nd sess., 29th Cong.

erence is made to the establishment of civil government in California.¹ The one directing the establishment of civil government has already been cited ² and need not be repeated here. In the second group the principal communications which deserve consideration are the proclamations of Sloat and Stockton, and the constitution drawn up by the latter for the government of California. These will be considered in this chapter together with the administrations of Kearny and Mason. Frémont's brief rule was really a part of the administration of Stockton and does not deserve separate treatment.

Commodore Sloat's proclamation to the inhabitants of California is not dated but was probably issued July 7, 1846.³ In it he declared that although he came in arms with a powerful force, he did not come as an enemy to California. On the other hand, he claimed to be the best friend the people of that territory had, and announced that henceforth California would be a portion of the United States. Under the stars and stripes the country would be free from factional disturbances and commercial restrictions which it had experienced under Mexico. The revenue laws would be the same there as in the rest of the United States, thus se-

¹ The first is the well-known letter of June 3, 1846 from Secretary Marcy to General Kearny; the second, a letter from Major General Scott to General Kearny; and the third, a letter from General Kearny to the Adjutant General at Washington. In the first is the direction already quoted (see above p. 18), whereas in the other two are mere references to the organization of civil government. See H. Ex. Doc., 2nd sess., 29th Cong., Doc. No. 19, 6, 15, 25.

² See page 18 above.

³ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 100.

curing to the people all manufactures and produce of the United States free of duty and insuring them foreign goods at one-quarter of the duty they were then paying. A great increase was promised in the value of real estate and of the products of the country, and under the friendly guidance of the United States, the diplomatic Commodore declared, the country could not but improve more rapidly "than any other on the continent of America."¹

Equal political inducements were offered. The peaceable inhabitants would enjoy the same rights and privileges they then had, together with the privilege of choosing their own magistrates and other officers, and the same protection would be extended to California "as to any other state in the Union." The government would be a permanent one "under which life, property, and the constitutional right and lawful security to worship the Creator in the way most congenial to each one's sense of duty, will be secured." The judges, alcaldes and other civil officers were invited to retain their positions as formerly until the government of the territory could be more definitely arranged. The inhabitants who were not disposed to accept the privileges of citizenship and live peaceably under the United States would be given time to dispose of their property and leave the country. If they observed strict neutrality they would be permitted to remain.²

¹ In nearly all of their communications to the naval and military leaders in California the secretaries of the naval and war departments had urged conciliatory measures toward the people of California, the aim being evidently to win them over to the American cause.

² H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 102-03.

The proclamation was read at the custom house in Monterey, and was received amid hearty cheers from the troops and foreigners present, and by a salute of twenty-one guns from the ships in the harbor. Immediately afterwards copies in English and Spanish were posted at various places throughout the town. The *alcaldes* declined to serve under the new régime and two justices of the peace were appointed to preserve order.¹

The condition of Sloat's health did not permit him to do anything more towards establishing government in California. On the 23rd of July he ordered Commodore Stockton to assume direction of the troops on shore, and six days later turned over the entire command to him and returned to the United States.² On August 28th following, Commodore Stockton wrote Bancroft, Secretary of the Navy, as follows: "Thus in less than a month after I assumed the command of the United States force in California, we have chased the Mexican army more than three hundred miles along the coast; pursued them thirty miles in the interior of their own country; routed and dispersed them, and secured the territory to the United States; ended the war; restored peace and harmony among the people; and put a civil government into successful operation." He announced further that when he left the territory he would appoint

¹ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 100. A number of the Sloat-Stockton documents which cover this period may be found in H. Ex. Doc., 2nd sess., 29th Cong., No. 4, 640-75.

² *Ibid.* In his communication to the secretary of the navy dated August 28, 1846, Stockton said that he assumed full command on July 23rd. See *Ibid.*, 106.

Major Frémont governor and Lieutenant Gillespie secretary.¹

This letter, including thirteen other papers,² was forwarded to the department at Washington. Among these were a proclamation and some other documents outlining the civil government which the Commodore asserted had been placed in successful operation.

In the proclamation issued at Los Angeles on August 17th, California was declared to be a part of the United States. As soon as circumstances would permit, it was to be governed by officers and laws similar to those regulating and protecting other territories of the United States. "But until the governor, the secretary, and council are appointed, and the various civil departments of the government are arranged, military law will prevail, and the commander-in-chief will be the governor and protector of the territory." The people were requested in the meantime to meet in their several towns and departments, at such time and places as they might see fit, for the purpose of electing civil officers to fill the vacancies caused by those who declined to continue in office. If the people failed to make such elections, then the commander-in-chief as governor would make the appointments himself. Laws were to be administered "according to former usages of the territory."

All persons, of whatever religion or nation, who should adhere faithfully to the new government were to be con-

¹ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 106.

² All of these papers, however, were not forwarded to Congress by the secretary of the navy.

sidered as citizens of the territory and would be zealously and thoroughly protected in freedom of worship, person, and property. Those who would not support the existing government were not to be permitted to remain in the territory. Without special permission no one was to be permitted to bear arms outside of his own home, and if found doing so, he would "be shipped out of the country." All thieves were to be "put to hard labor on the public works, and there kept until compensation was made for the property stolen." As long as the country was under martial law all persons were required to be within their houses from ten o'clock at night until sunrise.¹

Five days later, August 22nd, another communication was issued to the people of California. Elections to be held in the several towns and districts of the territory were ordered for September 15th. They were to be for the purpose of electing alcaides and other municipal officers, and were to be held at the usual time and places for holding such elections.²

A circular was issued August 15th fixing tonnage duties on all foreign vessels at fifty cents per ton, and the duties on all goods imported from foreign ports at fifteen per cent *ad valorem*, payable in three instalments of thirty, eighty, and one hundred and twenty days. To ascertain the true value of goods in the ports where they were entered, "two judicious and disinterested persons were to be appointed to make the appraisement." One was to be selected by

¹ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 107-08.

² *Ibid.*, 108.

the government, the other by the party owning the goods.¹

The most important and the most interesting of the communications forwarded by Stockton to the secretary of the navy and sent by the latter to the House of Representatives in compliance with the resolution of December 15th, however, is the constitution drawn up by the Commodore for the government of California. "I, Robert F. Stockton, commander-in-chief of the United States forces in the Pacific ocean, and governor of the territory of California, and commander-in-chief of the army of the same," thus the document began, "do hereby make known to all men, that, having by right of conquest taken possession of that territory known by the name of Upper and Lower California, do now declare it to be a territory of the United States, under the name of the territory of California. And I do by these presents further order and decree, that the government of the said territory of California shall be, until altered by the proper authority of the United States, constituted in manner and form as follows."

The executive power was vested in a governor and a secretary, both of whom were to hold office for four years unless removed by the president, and both of whom were to reside in the territory. The governor was to be commander-in-chief of the army, was to perform the duties and receive the emoluments of superintendent of Indian affairs, and was to approve all laws passed by the legislative council before they should take effect. He might grant pardons

¹ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 110.

for offences against the laws of the territory, and reprieves for offences against the laws of the United States until the decision of the president could be made thereon. He was to commission all officers who should be appointed under territorial laws and should take care that the laws were faithfully executed. The secretary was to record all laws and proceedings of the legislative council, and all the acts and proceedings of the governor in his executive department. On or before the first Monday in December of each year he was to transmit one copy of the laws and one copy of the executive proceedings to the president of the United States, and two copies of the laws to the speaker of the House of Representatives for the use of Congress. In case of death, removal, resignation, or necessary absence of the governor, the secretary was authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence.

The legislative power was vested in the governor and in a legislative council consisting of seven members. The members of the council were to be appointed by the governor and were to hold their office for the term of two years, after which they were to be elected by the people annually. Their power was to extend to all subjects of legislation, but no law was to be enacted interfering with the primary disposal of the soil, no tax was to be imposed upon the property of the United States, nor was the property of non-residents to be taxed higher than the property of residents. If laws passed by the legislative council were disapproved by the governor the same would be null and void. The first session

of the legislative council was to be held at such time and place as the governor should direct. At this session, or as soon thereafter as the governor and council deemed expedient, they were to "proceed to locate and establish the seat of government for the said territory at such place as they may deem eligible; which place, however, shall thereafter be subject to be changed by the said governor and legislative council, and the time and place of the annual commencement of the session of the said legislative council thereafter shall be on such day and place as the governor and council may appoint."

The municipal officers of cities, towns, departments, or districts formerly existing in the territory were to be continued, and all their proceedings were to be regulated by the laws of Mexico, until other provisions were made by the governor and legislative council. All officers of cities, towns, departments, and districts were to be elected by the people annually in such manner as the executive and legislative departments should decide.¹

It may be noted here that the plan for governing California as outlined in the above document was never put into

¹ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 109-10. In the message accompanying these documents which were forwarded to the House of Representatives on December 22nd, the President approved and defended all that had been done in California. They were temporary regulations that had been authorized, he said, and depended on rights acquired by conquest. "They were authorized as belligerent rights, and were to be carried into effect by military or naval officers. They were but the amelioration of martial law, which modern civilization requires, and were due as well to the security of the conquest as to the inhabitants of the conquered territory." See Richardson, *Messages and Papers of the Presidents*, IV, 507.

operation, although an attempt was made to do so, as will be shown presently.

So much for the communications, which bore on the establishment of civil government in California, that were forwarded to the House of Representatives through the President from the war and navy departments.

Stockton's first proclamation to the people of California was not included among these documents. It bears no date but was doubtless issued on July 29th when Stockton assumed entire command. It is not likely that he would have issued such a document before he was in full charge of the land and naval forces; and as a copy was sent to Sloat, who sailed on the 29th, it could not have been issued after that date.¹

It is not my purpose to go into a discussion of the character of this famous proclamation. It has been scathingly denounced as "offensive, impolitic, uncalled for, inaccurate, and most undignified," and is declared by the same writer to have been "made up of falsehood, of irrelevant issues, and of bombastic ranting in about equal parts."² It has nothing to do with the establishment of civil government in California, and may therefore be passed over without further notice.

¹ The document is in H. Ex. Doc., 2nd sess., 30th Cong., No. 1, 1035-37.

² For a full discussion of the proclamation see Bancroft, *History of California*, V, 257-60. The receipt of the proclamation by the navy department was acknowledged November 5, 1846, in a letter from J. Y. Mason to Commodore Stockton. H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 89-91.

The Period of Stockton's and Frémont's Supremacy

Stockton's governorship lasted (if his position may be termed that of governor) from July 29, 1846, to January 19, 1847. During this time he had made two successful military expeditions in the south, created the office of military commandant of the territory and placed Frémont in that position, issued the proclamation already cited, defeated Kearny in a contest for governorship,¹ and had drawn up a constitution for a civil government in the territory. He had also issued orders regulating import duties and authorizing the election of alcaldes and other municipal officers. On the 16th of January, 1847, commissions were made out to Frémont as governor and to Russell as secretary of state, and on the 19th they assumed their respective duties.² The Commodore also appointed a legislative council of seven members, and summoned the same by proclamation to meet on March 1st at Los Angeles. The meeting, however, was never held. Some of the members declined to serve and finally the new administration decided to govern without a council.³

On the 22nd of January, Frémont, from the temporary capital at Los Angeles, issued a proclamation declaring "order and peace restored to the country," and requiring civil officers to return to their appropriate duties. The military was to render as strict an obedience to the

¹ For an account of the controversy between Stockton and Kearny see Bancroft, *History of California*, V, ch. 16.

² *Ibid.*, 432-33.

³ *Ibid.*

civil authority as was consistent with the security of peace.¹

The only item of interest during the approximately fifty days of Frémont's doubtful supremacy² was financial. On February 4th the Governor obtained a loan of \$2000 from Don Antonio José Cos, and sixteen days later, February 20th, \$1000 more, binding the United States government to return the same within two months from the dates of the loans, and agreeing to pay interest at the rate of three per cent per month. If, at the expiration of the term, the government wanted to make further use of the money, the interest was to be two per cent per month.³ On the 3rd of March Frémont obtained an additional loan of \$2500 from Eulio de Celis with interest at two per cent after eight months.⁴ On the same day the Governor signed an agreement pledging the United States to pay to this same Celis \$6975 for supplies furnished by him for the United States troops. If this latter bill was not paid on or before December 18th, 1847, it was to bear interest at the rate of

¹ Cutts, *Conquest of California and New Mexico*, 164. The proclamation was issued just after the final uprising in the southern part of the territory had been put down.

² On March 12th Colonel Cooke wrote: "General Kearny is supreme somewhere up the coast; Colonel Frémont supreme at Pueblo de los Angeles; Commodore Stockton is commander-in-chief at San Diego; Commodore Shubrick the same at Monterey; and I at San Luis Rey; and we are all supremely poor; the government having no money and no credit; and we hold the territory because Mexico is poorest of all." *Conquest of New Mexico and California*, 283.

³ *California Message and Correspondence*, 1850, 329.

⁴ *Ibid.*, 365-66.

two per cent a month.¹ The supplies were to consist of six hundred head of beef cattle for the use of the army.² On April 26th, 1847, Frémont certified that Celis had complied with his part of the agreement, "by delivering the number of cattle as specified."³

In his communication of October 9, 1847, to Adjutant General Jones at Washington, Mason declared that not one of the six hundred head of cattle was killed and that not one of them had been delivered when Frémont gave his receipt on April 26th.⁴ On the contrary they were delivered to Abel Stearns in two herds: one of four hundred and eighty-one head on May 1st, and the other of one hundred and nineteen on July 6, 1847, "both of which dates are subsequent to the discharge of the California battalion commanded by Colonel J. C. Frémont." The cattle, "furnished by a formal contract," Mason continues, "are delivered to a private individual, upon a special agreement (as he, Stearns, says) to breed on shares for the term of three years."⁵ In a document dated July 8, 1847, Celis gives the terms of the contract and says that he fulfilled his part of it to the satisfaction of the Governor, "who not having time to consume said cattle on account of having received a superior order to de-

¹ *California Message and Correspondence*, 1850, 365, 370.

² *Ibid.*, 370.

³ *Ibid.*, 371.

⁴ *Ibid.*, 363-64.

⁵ Mason submitted a list of several documents signed by the contracting parties and witnesses to prove his accusation. So far as these go his charges appear to be justified. For the complete list see *California Message and Correspondence*, 1850, 363-73.

liver up the command and disband the force, ordered said cattle to be delivered to Mr. Abel Stearns, as I understand, in the quality of a deposit, until the government should dispose of them.”¹ In a communication dated August 12th, however, Stearns admits that he held six hundred head of cattle, “the major part breeding cows,” and that they were held by a contract for a term of three years. At the end of that time he was “to return the same number and class, . . . with one-half of increase.” He declared that he considered the cattle as the private property of Frémont.² Frémont offered as his defence later that he put the cattle in private hands to secure himself if the government should fail to acknowledge the debt, but as Bancroft says, “this does not explain his certificate of delivery.”³

On March 18, 1847, Frémont, by allowing a premium of \$4500, had obtained \$15,000 from F. Huttman for drafts on the government. Secretary Buchanan refused to accept the drafts and they were protested. A suit was brought in London, where Frémont was arrested and put in jail, although he was soon released on bail. Judgment was obtained for the original \$19,500 with interest and cost, all amounting to \$48,814. To relieve Frémont of the embarrassment a bill was introduced into Congress that resulted in a long discussion in which the account of the conquest and the claims was once more gone over. By an act of March 3, 1854, Congress agreed to pay the \$48,814, but to charge the original

¹ *California Message and Correspondence*, 1850, 372.

² *Ibid.*, 367-8.

³ Bancroft, *History of California*, V, 435, note 35.

\$15,000 to Frémont until he should prove that the money had been spent for the public service.¹ Apparently he was never able to prove that it was so used.²

Kearny's Rule

The contest over the governorship which had begun between Stockton and Kearny was continued, after a brief interval, by the latter and Stockton's appointee, Frémont. Commodore W. Branford Shubrick arrived at Monterey on January 22nd to succeed Stockton in command of the Pacific squadron. While Shubrick had the instructions of July 12, 1846, addressed to Sloat and authorizing the naval officers to form a civil government,³ he was inclined to recognize Kearny's authority rather than Stockton's. Both agreed, however, that it was best not to reopen the controversy until more explicit orders should come from Washington, and Shubrick notified Frémont of this agreement.⁴ On February 12, 1847, Colonel Richard B. Mason and Lieutenant Watson arrived at San Francisco with orders which were positive.⁵ The letter from Scott to Kearny, dated November 3, 1846, stated quite clearly that the senior officer of the land forces was to be civil governor of the territory;⁶

¹ Bancroft, *History of California*, V, 465-66.

² *Ibid.*, 466. For a full discussion of the claims under Sloat, Stockton and Frémont, see 462-68 and references.

³ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 81-82.

⁴ Bancroft, *History of California*, V, 429.

⁵ *California Message and Correspondence*, 1850, 283-4. Letter from Kearny to Jones dated March 15, 1847.

⁶ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 15.

and the letter from Mason to Stockton written two days later bore similar information.¹ There was therefore no longer reason to delay, and Kearny determined to assume his duties as civil governor.

On March 1, 1847, a joint circular was issued by Shubrick and Kearny setting forth the separate duties which had been assigned each by the President. To the commander-in-chief of the naval forces had been given the regulation of the import trade and the establishment of port regulations; and to the commanding military officer were assigned the direction of land operations and the administrative functions of government.² This joint circular with general orders of instruction was delivered to Frémont at Los Angeles on March 11th by Captain Turner.³ Frémont promised obedience to the orders, but it was not until March 22nd that he started for Monterey in compliance with the orders of Kearny, arriving at the latter place in the evening of March 25th.⁴

The proclamation issued by Kearny is dated March 1st, but was drawn up on the 4th. In it the Governor declared that he entered upon his duties with an ardent desire to promote, as far as he was able, the interest of the country and

¹ H. Ex. Doc., 2nd sess., 29th Cong., No. 19, 91.

² *California Message and Correspondence*, 1850, 288.

³ Bancroft, *History of California*, V, 441. The order is given in part in *California Message and Correspondence*, 1850, 289. Frémont was ordered to bring all the archives and public documents and papers in his possession to Monterey immediately.

⁴ *Ibid.*, 442-3. This was Frémont's famous four days' ride. For a full discussion of the Kearny-Frémont controversy, see Bancroft, *History of California*, V, ch. 17.

the welfare of its inhabitants. Religious beliefs were to be respected and church property protected. The quiet and peaceable inhabitants were insured that they would not be disturbed either by enemies at home or from abroad, and they were urged to exert themselves in preserving order and maintaining authority. A free government was promised for California as soon as practicable, similar to those in the other territories of the United States. Until such a government was organized, the laws then in force which did not conflict with the Constitution of the United States would be continued until changed by competent authority. Those holding office were to retain the same, provided they swore to support the Constitution and to perform their duty faithfully. All the inhabitants of California were absolved from further allegiance to Mexico, and were declared to be citizens of the United States. An apology was offered for some "excesses and unauthorized acts" which were "no doubt committed by persons employed in the service of the United States, by which a few of the inhabitants have met with a loss of property." Such losses were to be duly investigated and those entitled to compensation would receive it.¹ The internal disorders which California had experienced for so many years were over, and henceforth, "under the star-spangled banner," peace and prosperity would follow. "The Americans and Californians are now but one people; let us cherish one wish, one hope, and let that be for the peace and

¹ The reference here is doubtless to those who had lost property during the Bear Flag movement and during the administrations of Stockton and Frémont.

quiet of our country. Let us as a band of brothers unite and emulate each other in our exertions to benefit and improve this our beautiful, and which must soon be our happy and prosperous, home.”¹

On March 10th, William Edward Petty Hartwell was appointed translator and interpreter of the Spanish language for the Governor at a salary of \$1500 a year.² The people of San Francisco, on the same day, were given all the “right, title, and interest of the government of the United States, and the territory of California, in and to the beach and water lots on the east front of said town of San Francisco, included between the points known as the Rincon and Fort Montgomery, excepting such lots as may be selected for the use of the general government by the senior officers of the army and navy now there.” The ground thus ceded was to be divided into lots and sold at public auction to the highest bidder, and the proceeds were to go to the town of San Francisco.³ On March 24th the Governor appointed Walter Colton judge of the court of admiralty for the territory of California.⁴ Three days later Colonel Mason was ordered to proceed to the southern military district of California and inspect the troops there. He was clothed with full authority to give such orders and instructions, both civil and military, as he might think conducive to the public interest.⁵

¹ *California Message and Correspondence*, 1850, 288-89.

² *Ibid.*, 290-91.

³ *Ibid.*, 291.

⁴ *Ibid.*, 291-92.

⁵ *Ibid.*, 292.

Captain John A. Sutter was appointed sub-agent for the Indians on and near the Sacramento and San Joaquin rivers on April 7th, and Mariano G. Vallejo, sub-agent for the Indians north of San Francisco Bay on April 14th.¹ On April 10th Silburn M. Boggs and John H. Nash were appointed first and second alcaldes respectively of Sonoma district.² Orders were issued by the Governor to the collectors of duties at various ports to receive nothing but specie, treasury notes, or drafts in payment of custom dues.³

These events, together with a few directions to alcaldes regarding judicial decisions, constituted the principal work of Kearny as civil governor of California. He addressed a report to General R. Jones at Washington on the 15th of March, giving an account of conditions in the territory. After recording incidents which have already been mentioned in this chapter, he informs General Jones that Colonel Stevenson arrived at San Francisco on March 5th, accompanied by three companies of his regiment with heavy ordnance and stores. From the large amount of ordnance and stores sent to California, he says, "I presume the territory will never be restored to Mexico," and declares that it should not be.⁴ The people of the territory would resist Mexican authority, so that nothing but dissensions could follow its restoration.

¹ *California Message and Correspondence*, 1850, 296.

² *Ibid.*, 295.

³ *Ibid.*, 298, 300, 301.

⁴ It will be remembered that his proclamation was dated March 1st. In this he had declared that the United States flag would float over California "as long as the sun continues to shine upon her." See the proclamation in *California Message and Correspondence*, 1850, 289.

The Californians were then quiet, and he would endeavor to keep them so by mild and gentle treatment. "Had they received such treatment from the time our flag was hoisted here, in July last, I believe there would have been but little or no resistance on their part.¹ They have been most cruelly and shamefully abused by our own people—by the volunteers (American immigrants) raised in this part of the country and on the Sacramento. Had they not resisted they would have been unworthy the name of men."

The climate he declared to be most healthful, and the soil rich. California with Oregon was destined to "furnish our 600 whaling vessels and our 20,000 sailors in them, besides our navy and troops, with their breadstuffs and most of the other articles they are to consume." The population at that time was reported to be about 12,000, of whom about one-fifth were immigrants. Besides these were about 15,000 Indians, nearly one-third of whom were called Christians, speaking the Spanish language. To protect the people from the wild Indians he recommended keeping one thousand soldiers in the territory for some years to come. He further recommended fortifying the harbors in the bays of San Francisco, Monterey, and San Diego. For the first of these he had already directed fortifications, utilizing the old Spanish fort at the entrance of the bay for the purpose.²

With the exception of Indian depredations and rumors in April that a Mexican army under General Bustamante was

¹ In other words, if Stockton and Frémont had followed the policy of Sloat and Larkin, there would have been no resistance from the Californians.

² *California Message and Correspondence*, 1850, 283-86.

coming to reconquer California,¹ Kearny's rule was a quiet one. Leaving the military and civil command to Colonel Mason, Kearny left Monterey either May 31st or June 1st for the East.²

Mason's Rule

In his communication to the President dated January 18, 1850, Secretary Crawford said "that the exercise of civil authority by any military officer in California, since the termination of the war with Mexico, was first assumed by Brevet Brigadier General Mason, under his proclamation, which was issued on the 7th of August, 1848, the next day after the intelligence reached him that peace had been restored between the United States and Mexico."³ But civil power had been exercised before the treaty of peace was signed, not only by Mason himself, but by those military and naval officers who had preceded him as governor of California. Whether such power was legally exercised is a question which the writer will not undertake to determine.

Colonel Mason had been a most faithful supporter of General Kearny during the administration of the latter, and the junior officer was naturally inclined to carry out the policy of his chief when he succeeded him as commander of

¹ Bancroft, *History of California*, V, 449.

² *Ibid.*, 451-2; *California Message and Correspondence*, 1850, 304; Cutts, *Conquest of California and New Mexico*, 213.

³ *American Quarterly Register and Magazine*, Vol. III, 603.

the military forces and governor of California in May, 1847. Unlike those who preceded him, he did not issue a proclamation immediately after coming into office. He became familiar with the responsibilities of his new position while working as a subordinate official under Kearny, and his own accession to power enabled him to direct affairs in person. Both officials assumed a sane, judicious attitude towards the various problems which came before them.

During the first few months of his administration Mason's duties did not vary greatly in scope from those of Kearny. He appointed alcaldes and land surveyors,¹ and, during the absence of Commodore Shubrick, collectors of import duties, and fixed the rates of the same.² He appointed Lieutenant Henry W. Halleck secretary of state on the 13th of August, 1847.³ He issued orders directing the military officers in the various parts of the territory to divide the country into districts, and by consulting one or more intelligent men in each district, compile rough estimates of the number of inhabitants in the territory.⁴ He directed the disposition of prisoners,⁵ and at least on one occasion, gave directions for the establishment of municipal civil government.⁶ In November, 1847, he was requested by four citizens of San Francisco to appoint a special court to quiet land titles in that town. Any court that might be appointed, he said, could

¹ *California Message and Correspondence*, 1850, 398.

² *Ibid.*, 406-07, 416, 418, 419.

³ *Ibid.*, 377.

⁴ *Ibid.*, 407.

⁵ *Ibid.*, 413.

⁶ *Ibid.*, 417.

quiet land disputes only temporarily, because such questions would be opened anew when the territory was formally annexed to the United States and proper law courts established. He therefore refused to make such appointments.¹ On the 29th of November he sent out proclamations to prohibit the sale of spirituous liquors or wine to Indians, and in December following issued orders to the alcaldes and Indian agents of the territory to do everything in their power to see that the provisions of the proclamation were enforced.² Directions for conducting trials by jury in cases where juries failed to come to a decision, were sent to the alcalde of San José on December 22nd,³ and to Carrillo of Santa Barbara on April 5, 1848.⁴

On July 25, 1848, Mason issued a warning to the miners. Men, he said, had left their families, and soldiers were deserting to go to the gold mines regardless of their obligations and their oaths. Unless families were "guarded and provided for by their natural protectors, and unless citizens lend their aid to prevent desertions from the garrisons of the country," the remaining military force in California would be concentrated in the gold regions to expel all unlicensed persons. Miners were declared to be digging gold on government land without charge and without hindrance, and were therefore under obligation to assist in apprehending deserters.⁵

¹ *California Message and Correspondence*, 1850, 440.

² *Ibid.*, 447.

³ *Ibid.*

⁴ *Ibid.*, 505.

⁵ *Ibid.*, 580.

The following day he issued orders for custom-house and port regulations for the harbors of California. Collectors were to visit merchant vessels immediately on their arrival. Merchant vessels found harboring deserters from the army or navy were to be confiscated and the masters thereof were to be punished according to laws of war, and any person enticing a member of a merchant crew to desert would be subject to fine and imprisonment. Anyone attempting to land goods without a permit from a collector would be subject to fine and confiscation of goods. Masters of vessels were to be held responsible for the action of the members of their crews while on land. All baggage belonging to passengers was to be inspected by the custom official before permission to land the same should be granted. Particular care was to be taken by custom officials to guard against the exportation of gold and silver on which the required export duty had not been paid. No person was to be permitted to visit a merchant vessel in the harbor until a custom-house guard or inspector came on board, and the masters of vessels were to be held strictly accountable for any communication between their passengers and crews with those of other vessels. And similarly all communication between those on board and those on shore was prohibited. The proceeds of all fines imposed and goods confiscated, or one-half of these, were to be given to the informer.¹

Definite official news of the end of the war reached Mason on the evening of August 6, 1848,² and on the following day

¹ *California Message and Correspondence*, 1850, 583-5.

² *Ibid.*, 597.

he issued his proclamation announcing the ratification of a treaty of peace and friendship between the United States and Mexico, by which Upper California was ceded to the former country. By the terms of the treaty, he declared, those residing in the ceded territory who wished to become citizens were absolved from further allegiance to the Mexican republic. Those desiring to retain their Mexican citizenship might do so, and they would be secured in person and property as long as they rendered strict obedience to United States officials. Congress would soon confer the constitutional rights of citizenship upon the people of the country, and doubtless would provide a regularly organized territorial government within a few months. "Indeed, there is every reason to believe that Congress has already passed the act, and that a civil government is now on its way to this country, to replace that which has been organized under the rights of conquest." In the meantime the holders of civil offices were to retain their positions. All vacancies which might occur were to be filled by regular elections held by the people of the several towns and districts after due notice of such elections had been given. The existing laws were, of course, to be retained until others were made to supply their place. With rhetorical promises of future commercial and agricultural prosperity for the country and an appeal for union and coöperation between Americans and Californians, the document closed.

Two days later Mason issued orders discontinuing the collection of revenue as military contributions and substituting therefor the revenue laws and tariff of the United

States.¹ The regiment of New York volunteers and other soldiers whose period of service ended with the war were discharged.² In a communication dated August 19th, he notified the adjutant general at Washington of these orders and requested further advice regarding his duties. No civil government had existed in California for the past two years, he said, except that which had been controlled by the senior military and naval officers, "and no civil officers exist in the country, save the alcaldes appointed or confirmed by myself. To throw off upon them or the people at large the civil management and control of the country, would most probably lead to endless confusion, if not to absolute anarchy; and yet what right or authority have I to exercise civil control in time of peace in a territory of the United States? or if sedition and rebellion should arise where is my force to meet it? Two companies of regulars, every day diminishing by desertions that cannot be prevented, will soon be the only military force in California; and they will be of necessity compelled to remain at San Francisco and Monterey, to guard the large depots of powder and munitions of war, which cannot be removed. Yet, unsustained by military force, or by any positive instructions, I feel compelled to exercise control over the alcaldes appointed, and to maintain order, if possible, in the country, until a civil governor arrive, armed with instructions and laws to guide his footsteps."³

Such were Mason's own ideas of his position, of his duties,

¹ *California Message and Correspondence*, 1850, 592.

² *Ibid.*, 597.

³ *Ibid.*

of his responsibilities, and of his difficulties after he learned that a treaty of peace had been signed between the United States and Mexico. He had sane, common sense ideas of what should be done, but he lacked adequate resources for dealing with the problems. That he could not abandon the growing population without exerting himself to afford protection and preserve order he felt quite positively. He believed that legally he had no right, and physically he knew he had insufficient force to accomplish his purpose. Under ordinary conditions his position would have been a most trying one, but when news of the treaty of Guadalupe Hidalgo reached him he was governing a United States territory under most extraordinary circumstances—so extraordinary in fact that it is doubtful if anything like it is known in history. It will, therefore, be interesting to notice briefly those things which rendered his position so trying, and which induced his successor to provide for the organization of a government.

CHAPTER III

GOLD AND ITS PROBLEMS

WITH the beginning of the discovery which we are about to record, the interest of the narrative shifts from the rulers and their plans to the gold rush and the resulting events.

In the early afternoon of Monday, January 24, 1848, Marshall discovered gold at Coloma on the south fork of the American river. During the following month additional discoveries were made, and the news was dubiously received at Monterey. By the month of May all doubt was removed and San Francisco's population began deserting for the mines, followed a few weeks later by Governor Mason's soldiers. On June 1st Larkin forwarded official news of the discovery, which was received at Washington about the middle of September.¹ A second official messenger started eastward a little later, sent out this time by Governor Mason and bearing a box of the precious metal, which was placed on exhibition in the war office at Washington during the last of November or the first of December.² In the early summer of 1848, Mason made a tour of the gold mines, and on August 17th following sent a report to the adjutant general at Washington. It will be necessary to notice the content of this report.

¹ Bancroft, *History of California*, VI, 114.

² *Ibid.*, 115.

Mason's Report

Mason and his attendants left Monterey on June 12th and reached San Francisco on the 20th. There he found that nearly all the male population had gone to the mines. "The town, which a few months before was so busy and thriving, was then almost deserted." From San Francisco he went by way of Bodega and Sonoma to Sutter's Fort, arriving at the last named place on the morning of July 2nd. "Along the whole route mills were lying idle, fields of wheat were open to cattle and horses, houses (were) vacant, and farms (were) going to waste." At the Fort they found all bustle and confusion. "Launches were discharging their cargoes at the river, and carts were hauling goods to the Fort, where already were established several stores, a hotel, etc." The only two employees Captain Sutter had at the time—a wagon maker and a blacksmith—were receiving ten dollars per day. Merchants were paying him one hundred dollars monthly rent per room, and a two-story house in the Fort was rented as a hotel at the rate of five hundred a month.

Remaining long enough to take part in "the first public celebration of our national anniversary at the Fort," the Governor and his company resumed their journey on the 5th. They proceeded twenty-five miles up the American river "to a point now known as the lower mines or Mormon diggings." There they found the hillsides dotted with canvas tents and bush arbors. A store and boarding shanties were in full operation, and about two hundred men were at work washing for gold in the full glare of a hot sun, some with

pans, others with close woven Indian baskets, but the majority with "a rude machine known as a cradle." A party of four men working with the cradle were averaging a hundred dollars a day.

Proceeding twenty-five miles further up the south branch of the American river, the Governor's company came upon another party of about four thousand miners. They were working with great success along the river, in the dry beds of streams, and on the mountain sides. A small gutter was pointed out to Mason not more than a hundred yards long, four feet wide, and two or three feet deep, where two men, William Daly and Perry McCoon, had obtained \$17,000 worth of gold in seven days just a short time before his arrival. "Captain Weber informed me," the Governor wrote, that he knew they "had employed four white men and about a hundred Indians, and that, at the end of one week's work, they paid off their party and had left with \$10,000 worth" of gold. Another small ravine was pointed out in the same vicinity from which had been taken \$12,000 worth of gold. "Hundreds of similar ravines, to all appearances, are as yet untouched. I could not have credited their reports had I not seen, in the abundance of the precious metal, evidence of their truth. Mr. Neligh, an agent of Commodore Stockton, had been at work about three weeks in the neighborhood, and showed me, in bags and bottles, over two thousand dollars (\$2000) worth of gold; and Mr. Lyman, a gentleman of education and worthy of every credit, said he had been engaged, with four others, with a machine, on the American fork just below Sutter's saw-mill, that they worked eight

days, and that his share was at the rate of fifty dollars a day; but hearing that others were doing better at Weber's place they had removed there, and were then on the point of resuming operations. I might tell of hundreds of similar instances; but to illustrate how plentiful the gold was in the pockets of common laborers, I will mention a simple occurrence which took place in my presence when I was at Weber's store. This store was nothing but an arbor of bushes, under which he had exposed for sale goods and groceries suited to his customers. A man came in, picked up a box of seidlitz powders and asked its price. Captain Weber told him it was not for sale. The man offered an ounce of gold, but Captain Weber told him it cost only fifty cents and he did not wish to sell it. The man then offered an ounce and a half, when Captain Weber *had* to take it. The prices of all things are high; and yet Indians, who before hardly knew what a breechcloth was, can now afford to buy the most gaudy dresses."

A Mr. Sinclair, whose rancho was three miles above Sutter's Fort, had been engaged about five weeks with fifty Indians when Mason saw him, and at the end of that time his net proceeds were about \$16,000 worth of gold. The proceeds of his last week's work had been fourteen pounds, avoirdupois, of clean, washed gold. A Mr. Dye of Monterey said that a company to which he belonged worked seven weeks and two days with an average of fifty Indian washers, and that their gross product was two hundred and seventy-three pounds of gold. His share, which was one-seventh, and which amounted to thirty-seven pounds after all expenses were paid, was then on exhibition at

Monterey. The most moderate estimate the Governor "could obtain from men acquainted with the subject was that upwards of four thousand men were working in the gold district, of whom more than half were Indians, and that from \$30,000 to \$50,000 worth of gold, if not more, was daily obtained." He had no hesitation in declaring "that there is more gold in the country drained by the Sacramento and San Joaquin rivers than will pay the cost of the present war with Mexico a hundred times over. No capital is required to obtain this gold, as the laboring man wants nothing but his pick, shovel and tin pan, with which to dig and wash the gravel; and many frequently pick gold out of the crevices of rock with their butcher knives in pieces from one to six ounces." ¹

Immigration

Such in brief was that part of Mason's report which dealt with gold in California. His account accompanied the President's message of December 5, 1848, and was im-

¹ *California Message and Correspondence*, 1850, 528-36. Mason recommended two plans for governmental realization of rents from land worked by the miners. One was that surveyors be sent out from Washington "with high salaries, bound to serve specified periods; a superintendent to be appointed at Sutter's Fort with power to grant license to work a spot of ground, say one hundred yards square, for one year, at a rent of from \$100 to \$1,000 at his discretion; the surveyors to measure the grounds and place the renter in possession. A better plan, however, will be to have the district surveyed and sold at public auction to the highest bidder, in small parcels, say from twenty to forty acres. In either case there will be many intruders whom for years it will be almost impossible to exclude." See *ibid.*, 532-33.

mediately published in the leading newspapers throughout the country.¹ The result was electrical. Between December 14, 1848, and January 18, 1849, sixty-one sailing vessels, averaging fifty passengers each, left New York, Boston, Salem, Norfolk, Philadelphia and Baltimore for the Pacific coast. During the same period many more left New Orleans, Charleston and other ports for the gold regions. In the month of February, 1849, sixty ships were announced to sail from New York, seventy from Philadelphia and Boston, and eleven from New Bedford.² The demand for vessels was so great that ships were diverted from every other service for the purpose of accommodating those clamoring for passage to California.³

Even foreign nations were affected with the fever, and by the middle of January, 1849, at least five different California trading and mining companies were registered in London with an aggregate capital of 1,275,000 pounds.⁴ Emigration to California was fostered not only by reports of the great gold discovery, but by the unsettled political conditions in Europe at that time. The *Revue des Deux Mondes* for February 1, 1849, published an announcement of the departure of vessels from Havre and from Bordeaux, from many ports of Spain, Holland and Germany, and from nearly all the principal ports of Great Britain.

"Among the Asiatic nations," says Bancroft, "the most

¹ Bancroft, *History of California*, VI, 116.

² *Ibid.*, 121.

³ *Ibid.*, 122.

⁴ *Ibid.*, 124.

severely affected by this malady were the Chinese. With so much of the gambling element in their disposition, so much of ambition, they turned over the tidings in their mind with feverish impatience, whilst their neighbors, the Japanese, heard of the gold discovery with stolid indifference.”¹ According to the *Alta Californian* for May 10, 1852, there were fifty-four Chinamen in California on February 1, 1849. By the end of the year the number had increased to seven hundred and ninety-one, and a year later, passed the four thousand mark.² In Australia the news was circulated by eager ship-masters, and the streets of the chief cities were placarded, “Gold! Gold! in California.” In a short time it became almost impossible to procure berths on departing vessels.³ When some energetic ship-masters offered gold to Asiatic merchants in exchange for their goods the excitement reached fever heat. In Manila even the government lotteries were forgotten for a time, and those of the French colony of the Marquesas Islands who were free, made immediate departure for California and were followed by the soldiers, leaving the governor alone to represent the government.⁴

In the meantime immigrants were toiling over the mountains and through the deserts from the north, south and east. Burnett, in his *Recollections*, thinks “that at least two-thirds of the population of Oregon capable of bearing

¹ Bancroft, *History of California*, VI, 124.

² *Ibid.*, note 27.

³ *Ibid.*, 125.

⁴ *Ibid.*, 124-25.

arms, left for California in the summer and fall of 1848.”¹ From northern Mexico, principally Sonora, came about four thousand before the spring of 1849.² To estimate the number that came overland from east of the Rockies during the summer and fall of 1849, would indeed be a difficult task. Bancroft says that twenty thousand immigrants had assembled at the various rendezvous along the Missouri river by the end of April, and that they began their westward journey early in May.³ Bayard Taylor estimates, in a general way, the number of those who completed the trip at thirty thousand.⁴ “From the first of May to the first of June,” to quote from the latter, “company after company took its departure . . . , till the emigrant trail from Fort Leavenworth, on the Missouri, to Fort Laramie, at the foot of the Rocky Mountains, was one long line of mule-trains and wagons. The rich meadows of the Nebraska, or Platte, were settled for the time, and a single traveler could have journeyed for the space of a thousand miles, as certain of his lodging and regular meals as if he were riding through the old agricultural districts of the middle states.”⁵

At the close of 1848, an apparently conservative estimate gives the population of California at twenty thousand, of

¹ Burnett, *Recollections of the Past*, ms. I, 325. Bancroft, *History of California*, VI, 112, note 4.

² Bancroft, *History of California*, VI, 113; Coutts, *Diary*, ms., 113, describes the general movement from Sonora, but does not give the number of immigrants.

³ Bancroft, *History of California*, VI, 146.

⁴ Taylor, *Eldorado*, II, 35.

⁵ *Ibid.*, 36.

whom eight thousand were Americans. This number, according to the same authority, increased to ninety-five thousand by the end of 1849. Of the seventy-five thousand immigrants who came during the year, approximately fifty-five thousand were Americans.¹ The majority of them arrived during the late summer and fall of the year at a time when the excitement in California was at its height. They doubtless represented every state in the Union, while among the twenty thousand foreigners came citizens from nearly every civilized country on the globe.²

How long would this heterogeneous mass of disorganized society have to wait for a divided government at Washington to give them protection? Obviously if former conditions were bad, they must have become intolerable before many months of that eventful year had passed. Relief from a situation which had been growing perceptibly more chaotic since 1846 was absolutely necessary. In fact the desire for a government had been growing with the difficulties which seemed to prevent the establishment of one.

¹ Bancroft, *History of California*, VI, 158-9, notes. Thorpe, *Constitutional History of the American People*, II, 288-89 says that by the middle of 1849, two hundred thousand people had arrived in California from various states and countries,—undoubtedly an exaggerated estimate.

² "The accompanying chart compiled from Bancroft's *Pioneer Register and Index* will give some idea of the number of foreigners, excluding Americans, who had come to California before 1849. The annual arrivals from each nation are indicated and the total number of foreigners in California at the end of 1848, excluding those from the United States, is also shown."

CHART SHOWING FOREIGN SETTLERS IN CALIFORNIA EXCEPT AMERICANS, UP TO 1848
COMPILED FROM BANCROFT'S "PIONEER REGISTER AND INDEX"

<i>Sandwich Is.</i>																				
<i>Canada</i>									3	1	1	1	1	7	3		1		17	2
<i>Australia</i>															1			1		
<i>Prussia</i>															1			1		
<i>New Zealand</i>															1			1		
<i>Philippine Is.</i>															1			1		
<i>Hawaiian Is.</i>						1									1	2	6		10	
<i>Poland</i>													1			1	1		3	
<i>Sweden</i>															1		1		2	
<i>Ionian Is.</i>					1					1									2	
<i>Bavaria</i>													1					1		
<i>Nova Scotia</i>														1				1		
<i>Switzerland</i>					1	1													2	
<i>Belgium</i>					1														1	
<i>Austria</i>	1									1		1							3	
<i>Denmark</i>	1	1			2					2		1							6	
<i>Norway</i>	1	1		1															2	
<i>Russia</i>	1						1												2	
<i>Italy</i>	4				1									1	1				7	
<i>Portugal</i>	5				2	1	1			1	1								11	
<i>Germany</i>	1		2	2	1	1	1	1		1	2	1	5	6	3	5	4	2	44	
<i>France</i>	5	2	1	3	4	1		4	1	2	2	1	4	5	3	3	1	2	45	
<i>Ireland</i>	13	2	3	1	1	2	1	1	1	2	2	1	4	3	11	2	12	1	58	
<i>Scotland</i>	15	1	1	2	2	1		1	1	3	1	2	2	3	1	2	2	1	37	
<i>England</i>	27	5	5	5	12	4	1	7	3	5	5	3	1	1	3	7	4	5	109	
1830.....																				<i>Total by Nations</i>
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Alcalde Rule

Under the existing government almost the entire control of local affairs rested in the hands of the alcaldes. Instead of having their jurisdiction confined to a town or district as under the Mexican rule, they sometimes exercised authority over several districts. Rev. Walter Colton was such an one. His judicial power extended over all the territory within three hundred miles of Monterey,¹ and within these limits there was no appeal from his decisions. "By the laws and usages of the country," he says, "the judicial functions of the alcalde of Monterey extend to all cases, civil and criminal, arising within the middle department of California. He is also the guardian of the public peace, and is charged with the maintenance of law and order, whenever and wherever threatened or violated; he must arrest, fine, imprison, or sentence to the public works, the lawless and refractory, and he must enforce, through his executive powers, the decisions and sentences which he has pronounced in his judicial capacity. His prerogatives and official duties extend over all the multiplied interests and concerns of his department, and reach to every grievance and crime, from the jar that trembles around the domestic hearth to the guilt which throws its gloom on the gallows and the grave."²

¹ Willey, *Transition Period*, 64. For a strong complaint against alcalde government see the report made to General Smith by the San Francisco committee appointed for the purpose. *California Message and Correspondence*, 1850, 733.

² Colton, *Three Years in California*, 230-31.

The trial was a very simple procedure. The plaintiff and the defendant appeared before the alcalde, stated their cases, produced their witnesses if they had any, and the dispute was decided by him immediately.¹ It is true that certain compilations of laws were used as a guide in determining cases, but frequently, in minor matters, the alcalde was himself the law. There were records of judicial or alcalde decisions "such as shaving a rogue's head who had shaved the tail of his neighbor's horse; or making a busybody, who had slandered a worthy citizen, promenade the streets with a gag in his mouth."²

Davis thought that more substantial justice was rendered by these alcaldes than by the majority of courts,³ but it was contrary to the American idea of justice. It may have worked, and doubtless did work well enough in the southern part of the country among the Spanish-speaking people who were accustomed to it, but it became increasingly annoying in the north as the foreign population spread over that section.⁴ It was in vain that the military governors tried

¹ Davis, *Sixty Years in California*, 106.

² Colton, *Three Years in California*, 249. Colton says that the Mexican codes as compiled by Frebrero and Alverez were used and that they "embody all the leading principles of civil law, derived from the institutes of Justinian."

³ Davis, *Sixty Years in California*, 106. As a matter of fact the system did not work as smoothly as Davis seems to imply nor was the authority of the alcalde as supreme in all places as was Colton's at Monterey. There are numerous cases of appeals to the military governor, and some of the decisions made by alcaldes were reversed by him. See *California Message and Correspondence*, 1850, 290-323, 476, 488, 512, etc. For a general statement see Willey, *Transition Period*, 64.

⁴ Willey, *Transition Period*, 64.

to appease objections by appointing American alcaldes and requiring trial by jury; complaints and protests continued.¹

Newspaper Opposition

Almost as soon as they were established in California, the newspapers began to voice public sentiment in regard to the alcalde system of government. On February 13, 1847, the *California Star* urged that a convention to form a constitution be called, justifying the demand by "railing at the existing order of things."² "We have alcaldes," wrote Semple, "all over the country, assuming the power of legislatures, issuing and promulgating their bandos, laws, and orders, and oppressing the people The most nefarious scheming, trickery, and speculating have been practised by some that was ever discovered to the light of heaven."³ Some even contended that there were no laws in force except "the divine law and the law of nature," while others asserted there must be law if it

¹ The first trial by jury was held on September 4, 1846, at Monterey. Willey, *Transition Period*, 68; Colton, *Three Years in California*, 47. The second jury trial occurred at San Francisco before Judge Bartlett. Bryant, *What I Saw in California*, 328.

William Hinckley, a native of Massachusetts, was elected first-alcalde of San Francisco district in 1844. Davis, *Sixty Years in California*, 205, 207. In July, 1846, Lieutenant Bartlett was appointed to the same position with George Hyde as second-alcalde, and at the same time Stockton appointed Colton alcalde of Monterey. *Ibid.*, 490-91; Colton, *Three Years in California*, 19. A little later Edwin Bryant was appointed first-alcalde of San Francisco by General Kearny. Bryant, *What I Saw in California*, 429.

² Bancroft, *History of California*, VI, 261.

³ *California Star*, February 13, 1847.

could be found.¹ "We have frequently heard it stated that there are general written laws in existence, for the government of the people of the whole territory," ran an editorial in the paper already referred to, March 27, 1847, "but we have not as yet been able to discover their whereabouts. . . . It seems to us that the continuance of the former laws in force, when it is impossible to produce them in any court in the country, or for the people to ascertain what they are, will be productive of confusion and difficulty."²

"Pacific," in the *California Star*, January 22, 1848, said that California, "since the United States flag was hoisted over it, has been in a sad state of disorganization; and particularly as regards the judiciary. Indeed, sir, we have had no government at all during this period, unless the inefficient mongrel military rule exercised over us be termed such."

And attacking the alcaldes the writer asserted that they exercised "authority far greater than any officer in our republic—the president not excepted—uniting in their persons executive, legislative, and judicial functions. The grand autocrat of all the Russians . . . is the only man in Christendom I know of who equals him."

"Pacific" was an extreme radical in his opposition to the existing government. In the *Star* for April 8, 1848, a

¹ Hunt, *Legal Status of California*, 70. In *Annals of American Academy* for November, 1898. See also Willey, *Transition Period*, 63, 70-71, 78.

² Also quoted somewhat differently in Hunt, *Legal Status of California*, 70. See Hittell, *History of California*, II, 656.

writer asserts that "the whole business,—civil, military, and naval,—has been one series of jumbings and contradictions itself." No such thing as civil law or organization, he declared, existed in the land. And an editorial in the same paper for June 3rd calls attention to the disorganized conditions, especially in the mines, and urges the adoption of some measures for the security of person and property.

"The people of this territory," so ran an editorial,¹ "have been induced from the first hour of its occupation by the forces of the United States, to believe a territorial government would be early granted them, that the welcome boon of a wise administration of wholesome laws was a prize already within their grasp. Lulled by the promises of our military and naval commandants, who have alternately exercised control over affairs of state, these people have never presumed to question with what powers these representatives of our government were clothed, but deferentially acknowledge the authority conferred upon them sufficient to protect their relationships with each other, as well as to prevent the interference of foreign nations."

Power, the article continued, had been given General Kearny to organize a civil government, but he had neglected to do it. Governor Mason undoubtedly had the same authority. "We can express astonishment, therefore, that . . . no movement had been made towards executing the will of the government.² . . . The people of this territory are

¹ *California Star*, May 20, 1848.

² A part of Marcy's instructions to Kearny, dated June 3, 1846, has been quoted at the beginning of chapter two. The instructions were qualified,

now awaiting the promised administration of decisive law. They require it—they expect it, and to it they are entitled.”

Opposition in San Francisco

In San Francisco public feeling became so strong that a convention of the people was called on the 12th of February, 1849. Four or five hundred men of the district assembled in Portsmouth square to consider ways and means of organizing a more efficient local government. After a session of three hours ¹ a resolution was drawn up declaring the absolute necessity “of having some better defined and more permanent civil regulations to replace the vague, unlimited and irresponsible authority” exercised by the appointees of the military rulers. In compliance with the resolution a plan of government was submitted by George Hyde, and was finally adopted by a large majority of those present.

Article one of the proposed plan provided for the election of a legislative assembly of fifteen members from the citizens of the district, any eight of whom should constitute a quorum for the transaction of business. Such laws as the assembly should make were to be in harmony with the Constitution

however, by the following sentence: “It is foreseen that what relates to the civil government will be a difficult and unpleasant part of your duty, and much must necessarily be left to your own discretion.” The next sentence, however, ordered him “to act in such a manner as best to conciliate the inhabitants and render them friendly to the United States.” The attitude taken by the writers of the above quotations would indicate that the Governor was not carrying out this part of his instructions.

¹ *California Message and Correspondence*, 1850, 734.

and with the common law of the land. To become effective all laws were to be signed by the speaker and by the recording clerk of the assembly. Members of the legislative body were to enter upon their duties on the first Monday of March.

According to the second article three justices of the peace were to be elected by the people, who were to have separate but equal jurisdiction in the district, and whose duty should be to hear and adjudicate all civil and criminal issues according to the common law as recognized by the Constitution of the United States. An election for both legislative and judicial officers was to be held on Wednesday, February 21st. They were to hold their office for a term of one year, "unless sooner superseded by the competent authorities from the United States government, or by the action of a provisional government now invoked by the people of this territory, or by the action of the people of this district." All officials were to be under a solemn oath to support the Constitution of the United States and to discharge faithfully their official duties. The franchise was to be extended to every male inhabitant of the district over twenty-one years of age.¹

After passing resolutions, first requesting members of the town council to tender their resignation to a committee appointed for that purpose, and second to have the proceedings of the convention published in the *Alta Californian*, the convention adjourned.²

¹ For the political and social conditions in San Francisco during the period, see Bancroft, *History of California*, V, 648-51 and notes, and VI, 208-20, 261-81.

² *California Message and Correspondence*, 1850, 729-30.

The election was held on February 21, 1849 as planned. Wyden Norton, Heron R. Per Lee, and William M. Steuart were elected justices of the peace; and Stephen A. Wright, Alfred J. Ellis, Henry A. Harrison, George C. Hubbard, George Hyde, Isaac Montgomery, William M. Smith, Andrew J. Grayson, James Creighton, Robert A. Parker, Thomas J. Roach, William F. Swasey, Talbot H. Green, Francis J. Lippitt, and George Hawk Lemon were chosen members of the first legislature.¹

The assembly held its first meeting at the Public Institute in San Francisco on Monday evening, March 5th. The oath of office was administered by Judge H. R. Per Lee, Hyde was appointed temporary chairman, and the members proceeded to the election of officers. Lippitt was elected speaker and J. Howard Ackerman clerk. J. Cade was appointed sergeant-at-arms and E. Gilbert printer. On motion a committee of three was appointed to act in connection with the judges of the district, whose duty should be to report a code of laws as soon as practicable. At a second meeting held on the following evening a committee was appointed to wait upon Major General Persifor F. Smith, who had superseded Mason as commander of the Pacific military division, on February 26th, and Commodore Thomas Catesby C. Jones of the naval forces on the Pacific. The committee was to inform these officers of the motives which had impelled the people of San Francisco to organize a government, and respectfully to solicit the support of the military and naval forces.²

¹ *California Message and Correspondence*, 1850, 731.

² *Ibid.*, 732.

The committee reported to General Smith on March 10th. Briefly stated, the reasons given for organizing a local government were the following: (1) the extensive powers exercised by the alcaldes were incompatible with the American sense of justice; and since the treaty of peace was signed, they had been exercising not only greater powers but had begun even to abuse their authority; (2) the people had waited in vain for Congress to organize a government for the territory, and since the ratification of the treaty of peace, the committee believed, Governor Mason had withdrawn "from all connection with the civic relations of the territory."¹

General Smith's reply was dated March 27th. He made no attempt to answer the arguments made by the committee, but said he could not support the government which the people of San Francisco organized. His reason was that the military rule established during the war had been recognized by the President as a *de facto* government, and must be so recognized until Congress should organize another. Any officer under the existing government who was not doing his duty or who was abusing his power, the General promised, would be removed and punished when proven guilty.²

The opposition to the existing order of things was stronger in San Francisco than elsewhere because the population was largely American. It is true that the majority of the people in the mining section were also from the United States, but they were too completely absorbed in the search

¹ *California Message and Correspondence*, 1850, 732-35.

² *Ibid.*, 735-7.

for gold to take the same proportionate interest in governmental affairs as the people in the towns. The feeling of dissatisfaction was general, however, and became more so as immigration increased. Unable to secure the protection to which they believed themselves entitled in their local affairs, there seems to have been a tendency, more or less general in the northern towns, to assume such authority as the people of the communities deemed necessary for their own protection¹—a tendency with which the military rulers did not always interfere.² Gradually, as the local dissatisfaction became more widely known, the people in various parts of the territory began to think of some general method of organization which would relieve the territory of alcalde rule and provide for a more substantial system of government. Several towns held meetings and discussed the propriety of such an organization during the latter part of Mason's governorship. When Riley succeeded him on April 12, 1849, therefore, conditions were ripe for the establishment of a general government.

¹ At Monterey, for instance, the people took matters into their own hands and quickly dispatched some American desperadoes who committed assaults on the native population. Roach, *Statement of Historical Facts on California*, ms., 5. San Francisco's summary disposal of the "Hounds" is well known. See Bancroft, *History of California*, VI, 211-12.

² General Smith, in his reply to the San Francisco committee already referred to, said he believed that the people of each district "should have and exercise the free right to establish such interior regulations for police and security" as they might deem necessary, providing such regulations were in harmony with the existing laws. *California Message and Correspondence*, 1850, 737.

CHAPTER IV

CALL AND ORGANIZATION OF THE CONVENTION

As we have seen already, the *California Star* as early as February 13, 1847 urged the calling of a convention to form a constitution for a territory, but public sentiment was not ready for such a move at that time. A murder committed in the mining district in November, 1848, furnished the occasion for the *Star and Californian* to renew the proposition.¹ At about the same time news came that Congress had adjourned without providing a territorial government, and several companies of immigrants arrived in California, many of whom had assisted in forming independent governments in Oregon and "Deseret."² A new impulse was given to the idea as a result. Mass meetings were called December 11, 1848 at San José; December 21st at San Francisco; and at Sacramento on January 6th and 8th, 1849.³

¹ "The tragedy late enacted in the mining district affords still another melancholy instance of outraged law. . . . In a word, it brings vividly before us the momentous question—Shall we have a civil Government in California?" *Star and Californian* for Dec. 2, 1848.

A man by the name of Pomeroy and his companion had been killed for the gold-dust they carried.

² Bancroft, *History of California*, VI, 269.

³ *Ibid.*

Public Meetings Recommending a General Convention

The people of San José assembled in the alcalde's office, appointed a committee to draw up resolutions, and recommended that a convention be held at that place on the second Monday of January for the purpose of organizing a civil government for the territory. K. H. Dimmick, Benjamin Cory and J. D. Hoppe were elected delegates to the convention.¹ At San Francisco also resolutions were passed. These were to the effect that the "frequent murders and other daring outrages committed of late in different parts of the country, especially at the mines, while there was no proper legal protection for the lives and property of the citizens, had forced the people to conclude that Congress had been trifling with them in delaying the long proposed constitution—that there was no more time to wait—and therefore that instant steps should be taken to establish a form of government for themselves."² It was determined to send five delegates, these to be chosen at a subsequent public meeting, to represent the town and district in a general convention to be held at San José in March, 1849, "for the purpose of framing a form of constitution."³ A little later the committee of correspondence of San Francisco recommended a postponement of the convention to the 6th of May. The very severe rainy season, which would make it difficult to communicate with the southern districts, together with

¹ Bancroft, *History of California*, VI, 269 and note.

² *Annals of San Francisco*, 208.

³ *Ibid.*

recent intelligence from the United States which indicated that Congress would organize a territorial government before adjourning, were the reasons given for desiring a postponement.¹

The meeting at Sacramento was presided over by Peter H. Burnett, who had been a judge and a legislator in Oregon and who had helped to form the Oregon laws. A set of resolutions framed by a committee appointed for the purpose declared that Congress had not extended the laws of the United States over the country as the President had recommended: "that the frequency of robberies and murders had deeply impressed the people with the necessity of having some regular form of government, with laws and officers to enforce them;" that the great immigration movement as a result of the gold discovery had added to the general confusion; therefore it was resolved to be necessary and proper for the people of California to adopt some measures to protect themselves. They still maintained their loyalty to and confidence in the United States, and hoped that Congress would sanction the steps which they were taking. They indorsed the proceedings of the meetings held at San José and San Francisco, and recommended the election of delegates to represent Sacramento in a convention to be held at San José on March 6th for the purpose "of draughting a form of government to be submitted to the people for their sanction."²

Meetings were also held at Santa Cruz, Monterey, and

¹ Bancroft, *History of California*, VI, 270.

² *Ibid.*, 269, note 32.

other towns throughout the territory, resolutions were drawn up and delegates elected.¹ The time of holding the meeting was finally changed from May to the first Monday in August. Sacramento protested against a postponement but finally had to yield to the will of the majority.

Opposing Theories

As we have already seen, General Riley arrived in California and assumed control of the government on the 12th of April. He came as a civil governor and not as a military ruler. It did not take him long to learn of the various town meetings which had been held, nor was he slow in feeling the beat of the public pulse. A government of some kind must be formed for the people or they would form one for themselves.² According to the so-called "administration theory" the actions of the people must be directed by the civil governor.

The advocates of this theory asserted that under the general principles of the law of nations, the laws of California which were in force at the time the treaty of peace was signed must continue in force until changed by competent authority. That authority Congress alone possessed. Hence the laws existing, though defective, must continue in force until changed by Congress. Because of the vacancy of the governorship the responsibilities of the chief executive

¹ Bancroft, *History of California*, VI, 270, note 33.

² *Ibid.*; Willey, *Transition Period*, 84.

devolved upon the commanding military officer. He became *ex officio* civil governor.¹

In opposition to this was the "settler's theory," sometimes called the Benton theory because recommended by him. The advocates of this theory held that the Constitution of the United States and American principles were extended over California as soon as the treaty of Guadalupe Hidalgo was signed. At that moment the Mexican civil law was suspended. As Congress had failed to provide a government, it was the business of the people to legislate for themselves. During the war military government was legitimate; since the signing of the treaty of peace, that government derived its right to govern from the presumed consent of the people. This theory was supported by the lawyers in California at the time.²

The two views were incompatible. Obviously if California was to have an adequate civil government a compromise of some kind was absolutely necessary.

The Proclamation Calling a Convention

As already indicated, Riley had determined soon after his arrival to permit the people to form a government for themselves, but he was equally determined that the meeting for that purpose should be at the call of the Governor. On the 28th of May, 1849, the steamer *Edith* brought official news that Congress had adjourned without providing a

¹ Hunt, *Legal Status of California*, 81-82.

² *Ibid.*

territorial government.¹ On June 3rd following, Riley had issued his proclamation, which had been prepared by Secretary Halleck in advance.

In this document Governor Riley spoke of the recent failure of Congress to provide a government for California and called attention to the means which he deemed "best calculated to avoid the embarrassments of our present position." He defended his own position, setting forth the administration theory of government in California, and declaring himself to be a civil and not a military ruler. The fact that he was commander of the troops did not alter the case in the least. "The instructions of the Secretary of War make it the duty of all military officers to recognize the existing civil government, and to aid its officers with the military force under their control." The military was subject to the civil authorities and not the civil to the military.

He called attention to the fact that the position of California differed from that of Oregon, with which it had been compared, and resembled that of Louisiana after the latter's acquisition by the United States. Oregon had had no laws, while California had a system, which, although somewhat defective and requiring many changes and amendments, would have to continue in force until repealed by competent authority. The decisions of the Supreme Court in recognizing the validity of laws existing in Louisiana previous to its annexation to the United States, providing such laws were not inconsistent with the Constitution and laws of the United

¹ Willey, *Transition Period*, 85-86.

States, furnished a "clear and safe guide in our present situation."

Since Congress had failed to organize a new territorial government, it became the duty of the civil governor to take some active measure to provide for one. The needs of the country made it imperative that while this was being done, the administration of the existing laws should be carried out with vigor. It would take some time for the convention which he would call to "meet and frame a state constitution or a territorial organization." The plan which the convention would propose would have to be ratified by the people, approved by Congress, and then put into operation. In the meantime the existing government would be completely organized to meet temporary wants.

The proclamation then gave a brief summary of the machinery of California government as it had existed under Mexico—a governor, a secretary, a territorial legislature, a superior court, a prefect and sub-prefect for each district, a judge of first instance for each district, alcaldes, and local justices of the peace—and ordered that all vacancies be filled by popular vote on August 1st, when delegates were to be elected to a general convention for forming a state constitution or for drawing up a plan for a territorial government.

The general convention was to consist of thirty-seven delegates and was to meet at Monterey on September 1st. The apportionment of representation was to be as follows: the districts of San Diego, Santa Barbara, and San Luis Obispo were to send two each; Los Angeles, Sonoma, Sacra-

mento, and San Joaquin, four each; and Monterey, San José, and San Francisco, five each. The boundaries of the ten districts into which the territory was divided were indicated in the proclamation.¹ The places for holding the election were named, and the local *alcaldes* and members of the *Ayuntamientos* were to act as judges and inspectors of elections. If on the day of the election there should be less

¹ The boundaries of the respective districts were as follows: San Diego, bounded on the south by Lower California, on the west by the sea (Pacific ocean), on the north by a parallel of latitude "including the mission San Juan Capistrano," and on the east by the Colorado river; Los Angeles, on south by San Diego, west by the sea, north by the Santa Clara river and a parallel running from its source to the Colorado, east by the latter river; Santa Barbara, south by Los Angeles, west by the sea, north by the Santa Inez river and a parallel running from the source of that stream to the summit of the coast range of mountains, east by the coast range; San Luis Obispo, south by Santa Barbara, west by the sea, north by a parallel "including San Miguel," east by the coast range of mountains; Monterey, on the south by San Luis Obispo, north and east "by a line running east from New Year's point to the summit of the Santa Clara mountains, thence along the summit of that range to the Arroya de los Leagas, and a parallel of latitude extending to the summit of the coast range and along that range to San Luis." (The western boundary was not given but was of course the Pacific); San José, on the west and south by the Santa Clara mountains and Monterey, east by the coast range, and north "by the straits of Carquenas, the Bay of San Francisco, the Arroya of San Francisquito and a parallel of latitude to the summit of the Santa Clara mountains;" San Francisco, south by San José and Monterey, west by the sea, north and east by the Bay of San Francisco (this district also included the islands in the bay); Sonoma included "all the country bounded by the sea, the bays of San Francisco and Suisun, the Sacramento river and Oregon;" Sacramento, south by the Cosumnes river, west and north by the Sacramento river, east by the Sierra Nevada; San Joaquin "includes all the country south of the Sacramento district and lying between the coast range and the Sierra Nevada mountains."

than three such judges and inspectors present at each election precinct, the people were to appoint some competent persons to fill the vacancies. The judges and inspectors were to take an oath "faithfully and truly to perform" their duties. The returns were to state distinctly the number of votes received for each candidate, and were to be signed by the inspectors, "sealed and immediately transmitted to the secretary of state for file in his office." The franchise was to be granted to "every free male citizen of the United States and of Upper California, twenty-one years of age, and actually resident in the district where the vote is offered," and to "all citizens of Lower California who have been forced to come to this territory on account of having rendered assistance to the American troops during the recent war with Mexico," provided they cast their "vote in the district where they actually resided."

The method indicated in the proclamation for providing a more perfect political organization was declared to be the most direct that could be adopted. "It is the course advised by the President, and by the secretaries of state and of war . . . and is calculated to avoid the innumerable evils which must necessarily result from any attempt at illegal local legislation." ¹

Horsemen bore copies of the proclamation to various parts of the territory and posted them in the most conspicuous places. ²

¹ See Proclamation of the Governor in Browne, *Report of the Debates in the Convention of California*, 1849, 3-5.

² Willey, *Transition Period*, 86.

The Reception of the Proclamation

Even with the attitude of the people in favor of a convention, there seems to have been no little uncertainty as to just what kind of a reception the people would give the Governor's proclamation. In many places there had been a pronounced unwillingness to acknowledge his authority to call a convention or even to act as civil governor. At San Francisco a public meeting was called on June 12th and the citizens resolved to make no response to the proclamation and to send no delegates to the convention. To do so, they declared, would be yielding to military authority in civil affairs.¹ The feeling of hostility had been intensified by a special proclamation issued to the people of San Francisco by Governor Riley on June 4th in which he declared the legislative assembly of that town to be an illegal body, and forbade the people to pay taxes to support the government under it.² In defiance of the Governor's special proclamation to them, the people of that town, in a large and enthusiastic mass meeting, "*resolved* that the people of California had a *right* to organize a government for their own protection—that therefore delegates should be chosen to frame a constitution—and that a committee of five be appointed by the president . . . to correspond with other districts . . .

¹ Willey, *Transition Period*, 87, *Annals of San Francisco*, 222.

² *Annals of San Francisco*, 222. This had been done because the people of San Francisco had abolished the office of alcalde, substituting the senior justice of the peace, and had elected a sheriff. The alcalde refused to abandon his office and was supported by Governor Riley in his proclamation of June 4th.

in order to carry out in a practical manner the said resolutions." On the 18th of June this committee issued an address to the public. In this they denied—or at least refused to admit—"the right of Governor Riley to *appoint* time or place for the election of delegates and assembling" of a convention, but they considered it best to adopt the terms of the Governor's proclamation of June 3rd as a matter of expediency.¹

Thus the struggle ended. San Francisco yielded finally because she thought better results would be realized by cooperating with the Governor than by attempting to oppose him.² This idea doubtless served to reconcile opponents throughout the territory, and all looked forward to the coming election.

The Personnel of the Convention

The election of delegates was a success in all parts of the country,³ and preparations were made at Monterey for the reception of members of the Convention. The school which was in session in Colton Hall was suspended, and carpenters

¹ *Annals of San Francisco*, 222. For a brief account of the election at San Francisco, together with the names of the different officials elected, see *American Quarterly Register and Magazine*, III, 68-9. The account there given is taken from the *Alta Californian* for August, 1849.

² Willey, *Transition Period*, 87.

³ The elections were not held in all cases on August 1st, however, but the delegates elected at a later date were admitted to the Convention. Party politics, it has been asserted, played no part in the election, with the possible exception of the Sacramento and San Francisco districts. Taylor, *Eldorado*, I, 148.

began converting the second story into a suitable assembly room. A hotel was hastily constructed, a few restaurants were provided, and Monterey deemed herself ready to receive the delegates.¹

The proclamation had fixed the apportionment of representation for each district, as we have seen, but it also provided that any district thinking itself entitled to a larger representation might elect additional delegates and the question of their admittance would be determined by the Convention. As there was a large increase in population in certain districts between the 3rd of June and the day appointed for the election, August 1st, several districts chose additional representatives. When the Convention met, even before it was regularly organized, the question of admitting the extra delegates came up for consideration. Some time was spent in discussing the subject and various schemes of apportionment were suggested. The plan finally adopted resulted in giving the Convention a total membership of forty-eight. Of this number the San Francisco and Sacramento districts each had eight; San José, seven; Monterey and San Joaquin, six each; Los Angeles, five; San Diego and San Luis Obispo, two each; and three and one respectively from Sonoma and Santa Barbara. Thus of the forty-eight members, ten represented southern districts and thirty-eight northern.²

¹ Willey, *Transition Period*, 89, 92, Taylor, *Eldorado*, I, 148.

² The southern districts were San Diego, Los Angeles, Santa Barbara and San Luis Obispo. The districts north of the last named place were considered northern. See Carillo's speech in Browne, *Report of Debates in the Convention of California*, 1849, 22.

The large majority of the members were young men. More than thirty of them were less than forty years old, nine were less than thirty, and the remaining four had barely passed the half century mark. There were fourteen lawyers, eleven farmers, and seven merchants. The various trades and professions were represented by the other members, one giving his occupation as "elegant leisure."¹ Fifteen of the delegates may be considered as men from the southern states. One of this number, Wozencraft, was born in Ohio, but seems to have spent enough of his life in Louisiana to become thoroughly in sympathy with the people of the South. Of the fifteen, eight had been in California less than thirteen months, six had been living in the territory more than a year but not over three years, and one had been an inhabitant for five years. Every one of the fifteen, with one exception, represented northern districts. Of the twenty-three members from northern states, three represented southern districts. Fifteen of the number had been in California between three and twenty years and only eight less than three years. It will thus be seen that the members of the Convention who were northerners by birth and training must have had an advantage not only in numbers but in their familiarity with conditions in California. Thomas Larkin and Abel Stearns, both of whom came from Massachusetts, had been in the territory sixteen and twenty years respectively. They were both business men of considerable prominence in the districts which they rep-

¹ Browne, *Report of the Debates in the Convention of California*, 1849, 478-9. This work will be referred to in the future as Browne, *Debates*.

resented, and their long experience in dealing with Californians "over the counter" must have given them a good deal of influence among the native delegates. Among the latter there were five from southern districts and three from northern. The two foreigners, one from France and the other from Scotland, had been in the territory eleven and sixteen years respectively.¹ Their home environment would probably place them in sympathy with northern men so far as the slavery question was concerned; and as they came directly to California, it is very improbable that they found anything in the latter place to change their attitude.

It is hardly correct, then, to say that the Convention "was understood to be under the management, imaginary if not real, of southern men."² The misstatement is probably due to another which the same author obtained from a report on California made by T. Butler King.³ The latter received his information in 1850 from the two California representatives in Congress who had been members of the Constitutional Convention of 1849. These men told King that "of the thirty-seven delegates designated in General Riley's proclamation, sixteen were from slaveholding, and ten from non-slaveholding states, and eleven were citizens

¹ There were two others who were born in foreign lands, but one of them, Shannon, came to New York from Ireland when a mere boy; and Pedrovena, the other, from Spain to California twelve years before the Convention met. I have therefore considered the former as a northern man and the latter as a native. The two foreigners referred to above had been in the country longer, but they would not be as likely to sympathize with the natives as would a Spaniard.

² Bancroft, *History of California*, VI, 286.

³ *Ibid.*, 282.

of California under the Mexican government, and that ten of the eleven came from districts below thirty-six degrees, thirty minutes. So that there were in the Convention twenty-six of the thirty-seven members from the slaveholding states and from places south of the Missouri compromise line.”¹

An examination of the official report of the Convention will show that of the thirty-seven delegates recommended in Governor Riley's proclamation—only thirty-six of whom were elected²—fourteen were from northern states, twelve from southern, seven were natives (and five of these had been elected to the Convention from districts in the southern part of California), two were foreigners, and that the nativity of one is not given.³ The twelve additional members admitted by the Convention were all, with one exception, from northern districts, and of the twelve, nine were men from northern states.⁴ The official proceedings of the Convention also show that men from southern states were especially active in procuring seats for these additional delegates. It hardly seems probable, if they had determined to dominate the Convention and if they had had a presumptive majority of twenty-seven members,⁵ that they would have strengthened the ranks of their opponents by admitting

¹ H. Ex. Doc., 1st sess., 31st Cong., Doc. 59, 6. Compare Bancroft, *History of California*, VI, 282.

² One member, Covarrubias, was elected from two districts—Santa Barbara and San Luis Obispo; he chose to take his seat from the latter place.

³ Browne, *Debates*, 7, 8, 478–79.

⁴ *Ibid.*

⁵ Bancroft, *History of California*, VI, 282.

three times as many men from northern states as from their own section.

The Organization

The interest in gold digging and the expense and inconvenience of a journey from the northern and southern districts to the capital created some doubt as to whether the delegates would attend, even after the election. At noon on September 1st only ten had arrived, but they brought news that many more were known to be *en route*. The ten met in Colton Hall, but as the number was insufficient to constitute a quorum, they adjourned to meet again on Monday, September 3rd.¹ At noon on the day appointed, the Convention met and was opened with prayer by the Rev. Samuel H. Willey.² On the following day a regular organization was perfected. Dr. Robert Semple of the district of Sonoma was chosen president, and Captain William G. Marcy of the New York Volunteer regiment, secretary. Assistant secretaries, clerks, translators, doorkeepers, sergeant-at-arms, etc. were also elected or appointed.³ The parliamentary law as laid down in Jefferson's *Manual*, in so far as it was applicable, was to be recognized as the law of the Convention until otherwise ordered.⁴

¹ Browne, *Debates*, 7.

² *Ibid.*; also Willey, *Transition Period*, 89, 92; and Taylor, *Eldorado*, I, 148. The subsequent sessions were opened each morning with prayer, the resident clergyman and Dr. Willey officiating alternately.

³ Taylor, *Eldorado*, I, 149; Browne, *Debates*, 18, 19.

⁴ Browne, *Debates*, 19.

The appointment of the minor committees created no objections, but when it came to selecting a committee on the constitution some discussion arose. Gwin offered a resolution "that a select committee, composed of two delegates from each district, be appointed by the president to report the plan or any portion of the plan of a state constitution for the action of this body."¹ This brought up the question as to the kind of government which the Convention proposed to put into operation. Halleck of Monterey thought this subject should be settled first.² Gwin thought the adoption of his resolution would make perfectly clear the desire of the Convention on this point. It called for a plan for a "State Constitution." He did not believe any member of the Convention favored a territorial form of government.³ In this he was mistaken, however. Foster of Los Angeles was opposed to forming a state government at that time. Tefft of San Luis Obispo and Carillo of Los Angeles, "in compliance with the wishes" of their constituents, felt compelled to oppose the formation of a state government.⁴ They therefore agreed with Halleck and Foster in thinking that the question of a territorial government should be voted on separately. Since a large majority of the members seemed to favor the formation of a state government, said Carillo, why not divide the territory in two by running a line east

¹ Browne, *Debates*, 19.

² *Ibid.*, 20.

³ *Ibid.*, 20 and 21.

⁴ *Ibid.*, 21 and 22.

and west through San Luis Obispo? That part of California north of the line could then form a state government while the southern portion would be left free to adopt a territorial system.¹ No attention, however, seems to have been given the suggestion. Gwin's proposal was finally accepted and a standing committee of twenty was appointed by the chair to propose a plan for a state constitution.²

This committee did its work apparently between the regular sessions of the Convention, and from time to time submitted portions of plans for a state constitution. Such portions as were submitted were then taken up in the committee of the whole and discussed. It was called the standing Committee on the Constitution, and will be referred to as the Committee or as the Committee on the Constitution.

¹ Browne, *Debates*, 22.

² *Ibid.*, 29.

PART II

THE CONSTITUTIONAL CONVENTION

CHAPTER V

THE DEPARTMENTS OF GOVERNMENT

IN dealing with the work of the Convention I shall consider first the three departments of government as organized by that body. This will be followed by chapters dealing with (1) the free negro controversy; (2) the discussion over the eastern boundary for the new state; (3) corporations and banks; (4) education and taxation; (5) a group of miscellaneous provisions; and (6) a chapter on the sources of the constitution of 1849. Some of these were of course embodied in sections which were proposed as, or which became parts of, some one of the articles dealing with the departments of government, but obviously they are not concerned with the actual organization of those departments. They come rather under the head of directions to the departments concerned. Nevertheless they include the big questions—in some cases, vital questions—and the discussion which they produced gives them an interest in themselves.

Article three of the constitution declared that the powers of government of the state of California should be divided into three separate departments—the executive, the judicial, and the legislative—and that no person who exercised powers properly belonging to one of these departments should exercise any “function appertaining to either of the others, except in the cases hereinafter expressly directed or per-

mitted.”¹ The exceptions provided for were such as are found in most state constitutions: the power of the assembly to impeach and of the senate to try impeachment cases, of the governor to call special sessions of the legislature and to adjourn that body when the two houses could not agree upon a time for adjournment, and of the legislature to establish certain tribunals, to fix the time and place for holding terms of the higher state courts, and to determine the number of justices of the peace to be elected in each county.²

I. The Executive Department

The executive department provided for a governor, who was to be the chief executive, for a lieutenant governor, a secretary of state, a comptroller, a treasurer, an attorney general, and a surveyor general, each to hold office for a term of two years. The governor and the lieutenant governor were to be elected by the qualified electors of the state. The former, with the advice and consent of the senate, was to have the power of appointing the secretary of state. The other executive officials—the comptroller, the treasurer, the attorney general, and the surveyor general—were to be chosen by the joint vote of the two houses of the legislature at their first session under the constitution, but after that they were to be elected at the same time and place and in the same manner as the governor and the lieutenant gov-

¹ Browne, *Debates*, 308.

² *Ibid.*, *Constitution of California for 1849*. Articles on executive, legislative and judicial departments.

error. Each of these officials was to receive compensation for services, but such compensation was not to be increased or diminished during the term for which he had been elected, nor should any one of them receive for his own use any fees for the performance of his official duties. At the first reading of the article on the executive department a section was adopted giving the governor authority to suspend, during the recess of the legislature and until thirty days after the commencement of the next session, the secretary of state, the comptroller, the treasurer, the surveyor general, or the attorney general, when in his opinion they or any one of them were neglecting their duty. He was also authorized to fill vacancies which might occur in this way, his appointees to hold office until ten days after the meeting of the legislature. The governor should then make known to that body his reasons for such suspensions, and the legislature should, after due consideration, determine by joint ballot whether the officer so suspended should be removed or restored to office.¹ Such a grant of power to the governor would have been unusual, and upon the second reading of the article it was struck out.²

A slight discussion arose over the qualifications of the governor. An attempt was made to insert a section forbidding him to serve more than two consecutive terms, but it was voted down.³ A further attempt was made to declare ineligible for governor all who had not been for ten years

¹ Browne, *Debates*, 154-63; Bancroft, *History of California*, VI, 299.

² *Ibid.*, 342-43.

³ *Ibid.*, 156-7; Hittell, *History of California*, II, 765.

citizens of the United States or of California, but this, it was considered, would prevent natives from becoming candidates for the highest office in the state and was also rejected.¹

II. The Judiciary

There were three main points of discussion over the article on the judiciary as reported by the Committee on the Constitution. The first was over the union of district and appellate courts, the second over limiting the jurisdiction of the appellate court to sums amounting to more than \$200, and the last over the question of permitting judges to instruct juries "with respect to matters of fact."

The Committee in its report provided for a Supreme Court of four judges. Each was to be elected by the qualified electors in the one of the four judicial districts in which he resided, and was to hold office for a term of four years, provided the first election should be made by the joint vote of the legislature at its first session. Upon the organization of the court the judges were to be classified by lot so that one should go out of office every year. Circuit courts were to be held at stated periods by one of the judges of the Supreme Court in each of the four judicial districts into which the state was to be divided. There was also to be a court of appeals formed by any three judges of the Supreme Court, "but no judge shall sit in the court of appeals in any case upon which he has given a judicial opinion in the cir-

¹ Browne, *Debates*, 156-7.

cuit court." The fifth section also provided that the legislature should have power to increase the number of judges of the Supreme Court and the number of judicial districts," and whenever it shall deem expedient, it may provide by law for the separation of the court of appeals from the circuit court." When such separation occurred the court of appeals should consist of three judges who should be elected by the qualified electors of the whole state. They were to hold their office for six years and were to be classified so that one should go out of office every two years. The circuit judges, also to be elected, were to hold office for a similar term.¹

1. Opposition to Union of District and Appellate Courts

The first objection raised to these provisions was that the system there proposed provided for the union of two courts with the same judges.² This would make it very difficult to secure an impartial decision.³ It was true that a judge was not permitted to sit on a case in the appellate court when he had decided the case in the district court, but his colleagues of the other three districts may have formulated, while serving in the capacity of district judges in their respective districts, the principle on which his decision had been based.⁴ In such a case the Supreme Court would naturally support the decision of the lower court. The second

¹ Browne, *Debates*, 212.

² *Ibid.*, 214, 217, 223.

³ *Ibid.*, 217.

⁴ *Ibid.*

objection was that the system proposed would lack stability and permanency. The legislature could, at any time, interrupt the whole judicial system for the purpose of reorganizing the courts, thus producing endless litigation, confusion, and annoyance.¹

As a result of these objections the following resolution was submitted as a test question and was adopted by the Convention.

“Resolved, That in the opinion of the Committee the Supreme Court of Appeals should be separate and distinct from the District Courts.”²

Upon motion a committee of three was then appointed to make provisions for the separation of the two courts, and to submit proposals by noon of the following day. At the appointed time the committee offered a substitute for the objectionable sections. In the report provision was made for a Supreme Court, district courts, county courts, and justices of the peace. A chief justice and two associate justices were to constitute the Supreme Court. They were to be elected for a term of six years, at first by the state legislature at its first session and after that by the qualified electors of the state. The justices were to be so classified that one would go out of office every two years. The judges of the district courts were also to be elected for a term of six years by the qualified electors of their respective districts, and the county judges for a term of four years.³

¹ Browne, *Debates*, 215.

² *Ibid.*, 223.

³ *Ibid.*, 224, 233.

2. Appellate Jurisdiction of Supreme Court Limited

The fourth section of the series proposed by the special committee was also accepted by the Convention, but immediately after its passage Noriego raised objections to it because it did not place proper limitations on the appellate jurisdiction of the Supreme Court. He suggested that it be limited in its appellate jurisdiction to sums amounting to \$200. A motion to reconsider the fourth section then passed the House by a majority of fifteen to thirteen.¹

It was urged against the adoption of such an amendment (1) that frequently difficult measures and principles of the utmost importance—questions which had embarrassed the highest courts in the country—had turned upon amounts below \$200; ² (2) that the adoption of such limitations would be especially hard on poor people because it would shut them off from the higher courts; (3) the majority of cases below \$200 were brought into court by this class and they should be permitted to avail themselves of the highest judicial tribunal; ³ (4) that local judicial officials might be prejudicially inclined toward the rich of their community, which would make it very difficult for the poor to obtain unbiased decisions; ⁴ (5) that the principle of appeal was a just and righteous one and should not be denied any class of people ⁵ or limited in any way.

¹ Browne, *Debates*, 225.

² *Ibid.*

³ *Ibid.*, 226.

⁴ *Ibid.*, 229.

⁵ *Ibid.*

True, was the reply, great principles were frequently involved in the settlement of very small amounts, but the function of the Supreme Court should be not to decide principles but law.¹ Again, there was a class in every community who had money but had no capacity for taking care of it. This class "lawyers pounce upon like vultures upon dead bodies; and although the lawyers know they cannot succeed in their suits, they urge them to go on." Such people would receive protection from the ingenuity of lawyers who derived their income from cases of that kind, if the jurisdiction of the Supreme Court were limited as proposed.² Another reason given was that debts could be more easily and more quickly collected. Those cases arising for sums under \$200 were usually cases of wages or small debts owed to merchants. If such cases could be appealed there would be an endless delay in the collection of debts.³ And last it was urged as a "principle of common justice" that such a limitation should be placed. It would not be right to permit any petty suit "from five dollars up" to go through two, three, or four courts and finally come before the highest judicial tribunal in the state for "grave consideration and discussion." The decisions of the justices of the peace, made near the homes of the parties concerned, where the facts were known, would usually be correct.⁴ The section was then adopted giving the Supreme Court appellate juris-

¹ Browne, *Debates*, 225.

² *Ibid.*, 228.

³ *Ibid.*

⁴ *Ibid.*, 232.

diction "in all cases when the matter in dispute exceeds \$200 or concerns the legality of any tax, toll, impost, or municipal fine, and to all criminal cases amounting to felony, on questions of law alone." ¹

3. *On Charging Juries*

The seventeenth section provided that judges "shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." ² Such a provision, it was urged, defeated the end it was intended to accomplish. The judge, in stating the testimony, could interpret it in such a way that he would give the jury a prejudiced view of the case, and in many cases it would practically amount to charging juries with respect to matters of fact. It would permit the judge to exercise too much influence over juries. All cases arising in courts of law contained questions of two distinct and separate characters: one concerning law and the other concerning facts. The business of the judge was to declare the law; the duty of the jury was to determine the facts. To permit the judge to state the testimony would be as bad as to allow the jury to express an opinion upon the law. If the judge should give a correct statement of the facts, it could be nothing more than a mere repetition of what had been given by the witnesses. The twelve jurymen had heard the testimony and were in as good a position as the judge to determine the facts. Let the judge confine himself to declaring the law if fair trials were to be expected.

¹ Browne, *Debates*, 233.

² *Ibid.*, 234.

"If you will only put me on the bench," said Botts, "with all its influence, and permit me to instruct the jury upon what facts have been proved upon the trial, I will venture to assert, that in nine cases out of ten, the jury shall bring in just the verdict I wish. Permit me to state the facts, sir, and you give me the power to mould the verdict to suit myself." ¹

He was perfectly willing to admit, Shannon replied, that Botts might possess the extraordinary ability which he claimed to have. Perhaps it was true that a jury that had been proof against the eloquent appeals of the counsel might be completely carried away by the "seductive coloring given to the facts by the gentleman from Monterey." Given the right to state the testimony it might be possible for the judge to distort the facts and change the opinion of the jury, but if he did he would doubtless be impeached for his pains. It was well known that when the judge states facts to the jury, "if they are not to the letter true," he would be immediately interrupted by the counsel upon the side against which his statement appeared, and corrected. Thus it would be hardly possible for the jury to have a misstatement from the judge. On the other hand a judicial summary of the evidence was almost indispensable to the jury. It would be too much to expect them to remember all the testimony in a trial which might continue for a week, especially when they had no means of taking notes. "If you refuse to this impartial umpire a recital of the facts after a long trial," said Sherwood, "and after the eloquent

¹ Browne, *Debates*, 234-35 and 236.

speech of the district attorney, you probably send an innocent man to the scaffold.”¹

These arguments proved convincing and the section was adopted.²

III. The Legislative Department

But few changes were made in the executive department, as recommended by the Committee on the Constitution, and these aroused slight opposition. The article on the judiciary was also adopted practically as reported, with the exception of the first seven sections. The report on the department of the Legislature, however, contained sections which stirred up considerable discussion. The main arguments centered around four questions: whether the sessions of the Legislature should be annual or biennial, whether men who had been collectors or holders of public moneys should be permitted to occupy seats in either house of the Legislature unless they had settled their accounts with the state treasurer, whether lotteries should be permitted within the state, and whether the Legislature should be given permission to charter banks and corporations. As the two last are treated in another chapter they need not be considered here. A short discussion arose over limiting the ages of members of the assembly and of the senate to twenty-one and twenty-five years respectively, but the Convention finally decided to leave the subject to the discretion of the voters of the state.³

¹ Browne, *Debates*, 237-38; also see 235.

² *Ibid.*, 239.

³ *Ibid.*, 83-84.

1. Annual or Biennial Sessions of the Legislature?

The minority spoke strongly in favor of biennial sessions. Annual sessions, Gwin said, would produce excessive legislation, and experience had shown the evils of such legislation. Laws should be well tested before changes were made, and such tests would undoubtedly be rendered impossible with annual sessions, because experience clearly showed that new legislative bodies were inclined to act hastily. If occasion required, the governor could call an extra session. There was no danger of not having laws enough; the great danger came from having too many laws. The first Legislature probably would have to remain in session for some time in order to form a code of laws adequate to the needs of the new state. If the Convention would agree to appoint a commission to prepare a code to place before the first Legislature for their consideration, the work of that body would be simplified, the term could be shortened, and the expense would be less. The expense item was an important one and with annual sessions would certainly become too large.¹ McCarver thought a capitation tax would be required to defray the expenses of annual sessions, a tax which would be undoubtedly objectionable. Most certainly funds could not be raised on land owned in the state at that time to pay the expenses of annual sessions.²

Snyder said that he understood an effort would be made by members of the Convention to include the whole territory

¹ Browne, *Debates*, 77 and 80.

² *Ibid.*, 79.

known as California within the borders of the new state. If this were done it would be almost impossible for people living in the Salt Lake region to be fairly represented in the Legislature if annual sessions were held. It would take nearly the whole year for delegates from that district to make the journey to and from their homes.¹ However this might be, Brown considered that public interest required biennial sessions. Laws passed by the Legislature, if it met annually, probably would be in operation but six months before they were repealed. This would not give time enough to test them adequately. Such a sudden changing of laws would result in great inconvenience to the public and a loss to the individual. Time and experience were required to demonstrate the necessity of legislative reform. Imperfect administration might at first make laws objectionable, which, after being fairly tested, would prove most beneficial.²

On the other hand, Semple urged that the unsettled conditions in California demanded annual sessions, at least for a few years. If the majority of the Convention opposed making constitutional provisions for holding such sessions regularly, he suggested that a clause be inserted providing that after the first five years the sessions be held biennially. The first few years would be the most important in the legislative history of the state. It would be impossible to keep members of the Legislature at the seat of government more than two or three months in the year, because "of the pressure for time." The laws necessary for regulating

¹ Browne, *Debates*, 79.

² *Ibid.*, 81.

affairs of state could not be drawn up in that time.¹ Norton also called attention to the fact that the country was in a state of legal chaos. Such statutes of the Mexican system as were retained by the military authorities of the territory were repugnant to the feelings of Americans. Practically, then, the country was without any recognizable laws. This condition made annual sessions imperative. Usually there was great danger from too hasty legislation in new states under ordinary conditions; that danger would be greater in California with its rapid increase in population if the business of two years were crowded into one session. It might be more expensive, but California could afford the extra expense if necessary.² Sherwood did not believe that annual sessions would be any more expensive than biennial. If the Legislature met every other year instead of yearly it would have just twice as much work to do and the sessions would have to be made twice as long.³ And Halleck thought it might be wise to limit the sessions to a certain number of days or months, but that it was essential to make them annual.⁴

A vote was taken and the majority declared themselves in favor of annual sessions.⁵ An attempt was made later to change it,⁶ but this failed and the section as first adopted became a part of the constitution.

¹ Browne, *Debates*, 76.

² *Ibid.*, 77.

³ *Ibid.*, 80.

⁴ *Ibid.*, 78.

⁵ *Ibid.*, 82.

⁶ *Ibid.*, 309-11.

2. Should State Debtors be Excluded from the Legislature?

The twenty-second section of the article on the Legislature as reported by the Committee provided that no person who should become a collector or holder of public moneys should be admitted to either house of the Legislature, or eligible to any office of profit or trust under the state "until he shall have accounted for and paid into the treasury all sums for which he may be liable."¹ In the first reading the section was adopted, but was later rejected.² Norton, Wozencraft, and McCarver spoke in favor of retaining; while Price, Lippitt, and Shannon opposed it.

Norton said it was very important that persons holding office should be held strictly accountable for all moneys placed in their charge. This section would make them accountable and would protect the government against dishonest men. A man who was indebted to the state, whether the debt were contracted honestly or dishonestly, should not be permitted to occupy a seat in the Legislature. If the debt were incurred through carelessness or dishonesty, he was not fit to occupy such a position; if incurred honestly, he should stay at home and attend to his business until it was paid before engaging in political contests.³ Wozencraft thought a "defaulting officer" could have no object in running for the Legislature except to put through "such measures as would free him from his indebtedness," and McCarver

¹ Browne, *Debates*, 89.

² See *ibid.* and 315.

³ *Ibid.*, 89.

thought it would be impossible for the people to know whether officers had settled their accounts unless some such provision were included in the constitution.¹

On the other hand Price thought if the section were included that it might deprive some honest and deserving men of seats in the Legislature. It was perfectly possible that such men might be in debt to the state through no fault of their own; it was possible, even, that these men might be the very ones whom the people would want to send to the Legislature as their representatives. Furthermore such a provision would be unconstitutional because it fixed a penalty without trial; it required no verdict against the accused in any competent court. Again it was purely a legislative enactment and therefore had no business in the constitution. It afforded no protection to the people whatever. If a man had stolen the people's money they would doubtless know it; and if they did, he would not be elected to office by them.² These arguments were reiterated in part by both Lippitt and Shannon. Said the latter, "You say here that a man shall be deprived of his rights; that he shall not be eligible to any office when charged with embezzlement; when in another section you declare that no man shall suffer punishment until he has first had the advantage and benefit of a trial by jury, and is convicted by the judgment of his peers. Is this consistent?"³

Vermeule declared that he was in favor of disfranchising

¹ Browne, *Debates*, 89.

² *Ibid.* and 314.

³ *Ibid.*, 314 and 315.

a thief whether he were an official functionary or a private individual, and he wanted a constitutional provision which not only would make it impossible for such an individual to hold office but also would provide a law for putting him into the penitentiary. He therefore offered the following as a substitute for the section under discussion, and it was accepted.

“No person who shall be convicted of the embezzlement or defalcation of the public funds of this state shall ever be eligible to any office of honor, trust or profit, under this state; and the Legislature shall, as soon as practicable, pass a law providing for the punishment of such embezzlement or defalcation as a felony.”¹

¹ Browne, *Debates*, 315.

CHAPTER VI

THE FREE NEGRO QUESTION

THE question of the admission of free negroes was one of the first subjects to come before the Convention of 1849. As we shall see later, it was also discussed by the first Legislature. In both cases sectional interest fought for a constitutional provision or a legislative enactment against the admission of the negro race into California; in both cases sectionalism was defeated. This chapter will deal with the struggle in the Convention.¹ Before taking up the subject, however, it will be necessary to notice the character of the sectionalism to be considered.

Sectional Character of the Controversy

Such sectional feeling as existed in the controversy over the free negro question was manifested between the mining region and the other districts, especially San Francisco and San José, with the initiative exercised by the former district. So far as the Old North and the Old South were concerned no sectional lines were drawn. This will be shown by noting briefly the native states of the delegates from the leading districts which took part in the struggle.

¹ For the discussion of the subject in the first Legislature see pt. III, ch. 17 of this work.

The principal mining districts, Sacramento and San Joaquin, were represented in the Convention by fourteen delegates. Nine of them were from northern states and five from southern. San Francisco and San José were represented by fifteen delegates, nine of whom were from northern states, four from southern, one native, and one from France. Three of the southern delegates were from the district of San Francisco. Only one of the San Francisco delegates had been in the country more than three years. Five of the San José delegation had been in the country three years and one for ten years. That is, five delegates from San Francisco and San José had been in the country three years, one for four years, one for ten, and seven for less than three years. Seven from the mining districts had been in California three years or more. The San Francisco delegates—the leaders in the movement against the anti-negro clause and the delegation containing three of the four members of the opposition from southern states—had been on the Pacific coast but a comparatively short time. They had come recently from northern and southern states and would be as much inclined as any others to bear the prejudices of their respective sections. We shall see, however, that they worked very harmoniously in opposition to the free negro clause. It appears evident, then, since the struggle over the free negro question was mainly a contest between the mining region and the other districts led by San Francisco and San José, that it was not caused by rivalry between representatives of the Old North and the Old South.¹ This will be shown

¹ Browne, *Debates*, 478-79. Among the delegates from Monterey, Sonoma,

even more conclusively when we come to analyze the forces in the struggle.

The Probable Origin of the Question

The origin of the negro question in California has been explained by Major Edwin T. Sherman, a participant in the affair, as follows:¹ Before a government was regularly organized, the miners of California adopted their own by-laws, which they loyally obeyed and strictly enforced, prescribing the boundaries of their respective districts and electing their own recorders. It was the duty of these officials, when a claimant had located his ground, to measure it and record the same in the book of claims with the name of the claimant. It was also their duty to settle all disputes between claimants, but the latter could appeal from the decision of the former to the miners, whose verdict was final.

Between the middle and last of July, 1849, General T. J. Green² and a dozen other Texans, accompanied by about Los Angeles, San Diego, San Luis Obispo and Santa Barbara were six who had come to California from southern states and five from northern. Four of the eleven represented southern districts of California in the Convention (three of whom came from northern states) and seven represented the northern section.

¹ Major Edwin T. Sherman, *Reminiscences*, ms.

² Green was in California in November, 1849, and was elected to the Senate from the Sacramento district. On April 11, 1850, he was elected to the position of major general of the first division of California militia by the joint vote of both Houses of the Legislature. *Journals of California Legislature*, 1st session, 1850, 8 and 1186-87. For a scathing criticism of Green's book on Texas, Mexico, and the United States, and on his career before he came to California, see Houston's speech in the *Appendix to the Congressional Globe*, 1st sess., 33rd Cong., 1214-18.

fifteen negro slaves, came to "Rose's Bar" on the Yuba river, and, without regard to the mining laws of the district, proceeded to occupy about a third of a mile of land along the left bank of the stream, locating claims of their own measurement, not only in their own names but in the names of their negro slaves as well. The miners were aroused immediately; a meeting was called and the action of Colonel Green and his companions denounced. It was urged that they had violated not only the mining laws of the district, but also the laws of the United States governing public lands. Such lands could be occupied only by citizens of the United States, or by those who had declared their intention of becoming citizens.

A committee was appointed from among the oldest miners to confer with General Green and inform him that he must comply with the laws of the district. The General informed the committee that he would fight them if necessary, but that he would not surrender the claims occupied by his negroes. This frank and pugnacious rebuff served to arouse bitter indignation among the miners. On Sunday, July 29th, a general meeting of all those working claims along the river was held at "Rose's Bar." It was a meeting of men aroused by the fact that their laws were being violated, and they were determined that the violaters should be expelled from their midst. In order to prevent the recurrence of such a circumstance in the future a resolution was passed "that no slave or negro should own claims or even work in the mines." A new committee was appointed—of which Major Sherman was the youngest member—and was authorized to inform

General Green of the proceedings of the Sunday meeting, and again to request him to observe the mining laws of the district. The committee went unarmed to the camp of the invaders and made clear their errand. That night the slaves disappeared and were followed next morning by General Green and his band of Texans. On Wednesday, August 1st, the election of delegates to the Constitutional Convention was held, and the district in which "Rose's Bar" was situated sent William E. Shannon as their representative, with instructions to use his influence for a constitutional provision which would forever prohibit slavery in California.¹

It was in carrying out this wish of his constituents that Shannon indirectly introduced the free negro controversy.

The Question Before the Convention

The first effort to prevent the immigration of free negroes into California was made on September 10th, one week after the regular sessions of that body began. While the Bill of Rights was under consideration, Shannon offered the following, which was unanimously accepted as an additional section: "Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this

¹ This is a condensed account of the origin of the negro question as given by Major Sherman in a hitherto unused manuscript. It is a plain, straightforward narrative of an incident in which he was an active participant. His account is related in a clear and convincing manner. It affords a satisfactory explanation of the beginning of the movement of the miners against negroes and negro slavery, and on the whole its truthfulness is corroborated by subsequent events.

state.”¹ Before the clause was adopted, McCarver of Sacramento offered an amendment: “Nor shall the introduction of free negroes under indentures or otherwise, be allowed.”² A short debate followed over the propriety of combining the two propositions into a single section, which led McCarver to withdraw his amendment.³ A little later he proposed that section nineteen of the Bill of Rights should require the Legislature, at its first session, to pass such laws as would effectually prevent free persons of color from immigrating to and settling in California and “to effectually prevent owners of slaves from bringing them into the state for the purpose of setting them free.”⁴ Wozencraft of San Joaquin spoke at length in support of the proposition, urging social and economic reasons for its adoption,⁵ but Gwin convinced McCarver that such a measure rightly belonged to the legislative department. Again McCarver consented to withdraw his proposition temporarily.⁶

Three days later, September 13th, the Convention began work on the legislative department. On September 18th, when the delegates thought they were about to complete their work on this part of the constitution, Gwin called at-

¹ Browne, *Debates*, 43. The delegates from southern districts had been instructed by their constituents to vote against slavery on the ground that they “had enough variety of races, and the character of the country was not favorable to any but free labor.” Wilson, *Observations on Early Days in California and New Mexico*, ms., 110.

² Browne, *Debates*, 44.

³ *Ibid.*

⁴ *Ibid.*, 48.

⁵ *Ibid.*, 49-50.

⁶ *Ibid.*, 50.

tention to the fact that McCarver had been absent on account of sickness and had thus been prevented from proposing his clause prohibiting the immigration of free negroes. It was a matter, Gwin said, in which McCarver was deeply interested and he hoped the Convention would not proceed to further business until the latter had had an opportunity to bring the subject before the assembly for consideration. Following this suggestion the Convention adjourned.¹ Two days later, September 20th, McCarver proposed the following as the thirty-ninth section of article four:

"The Legislature shall, at its first session, pass such laws as will effectually prohibit persons of color from immigrating to and settling in this state, and to effectually prevent the owners of slaves from bringing them into this state for the purpose of setting them free."²

To McCarver the last clause in this proposition was more important than the first. He had been informed that certain individuals, whom he knew personally, were preparing to bring their slaves to California "upon indentures, and set them free." The state, he thought, had a "right to protect itself against an evil so enormous as this." There was no population on the globe that would be "more repugnant to the feelings of the people or injurious to the prosperity of the community" than negroes thus freed and

¹ Browne, *Debates*, 137. Bancroft's statement concerning this is misleading. He says that McCarver's proposition "was adroitly laid to rest by Green (meaning Gwin) who persuaded McCarver that his proposed section properly belonged in the legislative chapter of the constitution, where, however, it never appeared." *History of California*, VI, 291.

² Browne, *Debates*, 137.

thrown into the state. They were "idle in their habits, difficult to be governed by laws, thriftless and uneducated." It should be made the duty of the Legislature to pass such enactments as might be necessary to keep them out of California. "I am satisfied that every gentleman in this House," McCarver concluded, "will see the propriety of such a measure. I believe it to be equally as essential to the prosperity of this country as the prohibition of slavery. The evil would be greater than that of slavery itself. I therefore submit the proposition to the kind consideration of the House, in hope that it may become a part of the constitution." ¹

This brought the subject before the Convention. Semple from Sonoma, Wozencraft from San Joaquin, Steuart from San Francisco, Tefft from San Luis Obispo, and Hoppe from San José—with one exception men from the southern states—spoke strongly in favor of a constitutional enactment of some kind to prevent the negro race from coming to California. Tefft was not sure that he favored the clause offered by McCarver, but he thought something similar to it should be inserted in the constitution. The gold mines were already tempting slave-owners from various parts of the Union. If reports were true, Kentucky was at that very instant holding a convention in which its citizens were considering the advisability of freeing their slaves,² and the owners of negroes

¹ Browne, *Debates*, 137-38; Tuthill, *History of California*, 269; Thorpe, *Constitutional History of the American People*, II, 316-17.

² A convention assembled at Frankfort, Kentucky October 1, 1849, and the subject of abolition was discussed. See Thorpe, *Constitutional History of the American People*, II, 11, 12, 13.

in that state were corresponding with certain delegates at Monterey to obtain information concerning the attitude of the people of California toward slavery. Similar inquiries were coming from other states. Steuart asserted that he had received letters by the last steamer from friends in Maryland who made similar inquiries. "Sir," Steuart said, "it is our duty to declare the intention of the people of California in the constitution; and let us do it at once. Let us declare to those gentlemen who are about to engage in this enterprise that they cannot bring their negroes here on any condition or under any pretence whatever."¹

Shannon of Sacramento objected to the whole section proposed by McCarver—the last clause especially, because it was entirely meaningless. Why say "to effectually prevent the owners of slaves from bringing them into the state for the purpose of setting them free"? A clause had been inserted in the Bill of Rights which forbade slavery except as a punishment for crime. The owners of slaves, then, had no option in the matter. By the fundamental law of the land slaves became free as soon as they entered the state.²

It was probably this and other objections made to McCarver's proposal, some of them coming from men who were in sympathy with the idea, which led to the following proposal as a substitute for the one already before the House. It was offered by McDougal.

"The Legislature of this state shall at its first session create enactments against the introduction into the state of any

¹ Browne, *Debates*, 146-47.

² *Ibid.*, 139.

negro or negroes who has or have been slaves previously in any of the states of the Union, or any other country, and who are brought here under bonds or indentures of servitude." ¹

McDougal's aim was obvious. He wanted to guard California against owners who might, under contracts for limited terms of service, free their slaves at home and then bring them into the mining regions to work out their contracts. Shannon had shown that the last clause in McCarver's proposal was not sufficiently clear on this point. From what had been said, McDougal believed that many men in the border states would be glad to free their negroes, providing the latter would agree to serve six months or a year in the mines. Evidently he had no fear of the negroes who had been free for generations. He probably thought they would not undertake the long and difficult trip to California; at least not in sufficient numbers to warrant making constitutional provisions against them.

But there were others who did not share McDougal's opinion on this point. They wanted to keep the negro race, slave or free, out of California. Would McDougal's proposal do this? They did not think so. Steuart had a proposition which he thought would more nearly accomplish the purpose than either of those under consideration. He offered the following:

"It shall be the duty of the Legislature, as soon as may be, to pass such laws as may be necessary to prevent negroes and mulattoes from coming to and settling in the state of

¹ Browne, *Debates*, 142.

California, and shall declare null and void every indenture conditioned for the manumission or freedom of such negro or mulatto, or in consideration of any service to be rendered in California.”¹

Botts suggested that the wording should be somewhat like the following: “These objectionable individuals shall not be allowed to enter the state of California under such penalties as the Legislature may hereafter impose.” His object was to prevent negroes, either slave or free, from getting into the state. To provide a penalty in the constitution might not be wise; that could be left to the Legislature.²

Opposition to the Resolution

In the meantime the opposition had not been silent. Why insert anything in the constitution, said Shannon, which would affect the immigration of freemen to California, whether white or black?³ And Dimmick of San José declared that a clause had been inserted in the Bill of Rights permitting foreigners to exercise all the rights in reference to holding lands and enjoying political privileges which were granted to citizens of the territory. Why not live up to that declaration instead of inserting a clause in the constitution which practically nullified so liberal a policy? It would be unjust to attempt to prevent a “certain class of Americans, born in the United States” from entering the territory and enjoying the

¹ Browne, *Debates*, 147.

² *Ibid.*

³ *Ibid.*, 139.

privileges extended to natives of the Sandwich Islands, the Chilians, the Peruvians, and the lower classes of Mexicans. If a clause must be inserted in the constitution forbidding the immigration of free negroes, then for the sake of consistency, if for no other reason, omit the liberal section in the Bill of Rights. What would be said of a constitution which in one place extended the privileges of its free institutions to all classes, both from foreign countries and from its own, and in another, excluded from these privileges a class speaking the language in which the document was written, born and brought up in the United States, acquainted with the customs of that country, and capable of making useful citizens? Many of them were already not only useful but desirable citizens. They filled a place in the community which no other people could fill, and in many cases their presence had become almost essential for domestic purposes.¹ In some of the eastern states they formed communities of respectable citizens, many of them being men of intelligence and wealth.²

There was yet another reason for rejecting this proposal. It was not only unwise, it was not only unjust, it was not only inconsistent, but to insert a clause preventing the immigration of free negroes would be unconstitutional. Section two of the fourth article of the Constitution of the United States declared that citizens of each state should be entitled to all the privileges and immunities of citizens in the several states. In some of the eastern states negroes

¹ Browne, *Debates*, 140-41. These ideas were also expressed by Gilbert a little later. See page 150.

² *Ibid.*, 143. Shannon's speech.

were citizens. As such, was it not their privilege to move from one state into another if they chose? It was probable that few indeed would have any desire to come to California; but if they should, the state had no right to prevent them. "I believe your constitution will be rejected," said Gilbert of San Francisco, "if you make it [the proposed resolution] a provision which cannot be separated from it; I believe it will not be sanctioned by the people here; and even if sanctioned by them, that it will be rejected by the revisory power which it must pass at Washington. Sir, if there is any one consideration more than another that would tempt me to forego all my feelings and principles, it would be that of securing to California with as little delay as possible, a proper form of state government." ¹

Gilbert's pleadings and warnings were in vain, however. The immediate sentiment of the House was in favor of inserting the prohibitory clause. A vote was taken which resulted in the rejection of the resolutions of both Steuart and McDougal and in the adoption of McCarver's.² It would be interesting to know by how large a majority the resolution was passed, but the yeas and nays were not recorded.

The Defeat of the Resolution

When article four came up for a second reading about two weeks later, October 2nd, a strong opposition to the thirty-ninth section seems to have developed. Gilbert's

¹ Browne, *Debates*, 150.

² *Ibid.*, 152.

speech calling attention to the unconstitutional character of the section had left an impression.¹ There was probably a feeling more or less general that Congress would not accept the constitution if it contained the anti-negro clause.² The new problem, then, was to provide a section which would not only prevent negroes from coming to California, but would at the same time relieve any feelings of dissatisfaction which such a section might arouse in Congress. McCarver discovered what he believed would be a satisfactory solution of the whole difficulty. He offered his original proposition, adding to it a proviso clause taken almost verbatim from the constitution of Missouri.³ The thirty-ninth section would then read as follows:

"The Legislature shall, at its first session, pass such laws as will effectually prohibit free persons of color from immigrating to and settling in the state, and to effectually prevent the owners of slaves from bringing them into this state for the purpose of setting them free: *Provided*, That nothing in this constitution shall be construed to conflict with the provisions of the first clause of the second section of the fourth article of the Constitution of the United States." ⁴

McCarver thought this should obviate all objections. Personally he did not deem it necessary because he did not

¹ Browne, *Debates*, 330. Norton's motion.

² This seems a fair conclusion from the fact that McCarver attempted to amend his own resolution, which had been adopted, so as to prevent a conflict with the section in the United States Constitution already referred to. The section as amended is given above.

³ Browne, *Debates*, 331.

⁴ *Ibid.*

believe negroes were citizens. The decisions of the courts of the United States, he thought, had settled that question.

The subject was then taken up by Jones, a young lawyer from Virginia, who was one of the representatives from the district of San Joaquin. His speech reflects the sectional division on the question more clearly than any other, and makes apparent the fact that the mining districts considered San Francisco the leader of the opposition.

"I acknowledge," he said, "that it is to the interest of gentlemen from San Francisco that they should have their body servants at the lowest possible price. But it is a question of vital importance to the people of the mining districts, not merely affecting their comfort and convenience, but involving the very foundation of their prosperity. . . . There is now a respectable and intelligent class of population in the mines, men of talent and education; men digging there in the pit with spade and pick who would be amply competent to sit in these halls. Do you think they would dig with the African? No sir, they would leave this country first."¹

Then turning his attention to the arguments which declared that the insertion of a clause preventing the immigration of free negroes was contrary to the Constitution of the United States, he said that such arguments appeared to him to be without foundation. He thought there was no provision in the Constitution of the United States which would forbid the insertion of such a clause. It would be absurd. Every state had the right to determine the qualifications of its own citizens. Article four, section two of the Consti-

¹ Browne, *Debates*, 333.

tution of the United States provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Some were contending "that because New York, one of the states of the Union, sees fit to invest with the privileges of citizenship a class of citizens who, when that article was introduced into the Constitution of the United States, were not recognized by any of the states, that they are thereby invested with the rights of citizenship in every state in the United States, and that every state is bound to acknowledge them with all the privileges and rights of citizens." He thought that such a construction would lead to the most absurd of absurdities. When the section quoted above was introduced into the Constitution of the United States, there was not a state in the Union which endowed the negro with the rights of citizenship. New York was a slave state; Pennsylvania was a slave state; New Jersey was a slave state; and so were nearly all of the original thirteen.

Granting that such a construction were true, however, it would lead to another absurdity. "Suppose, for instance, that . . . Texas should admit negroes to the rights of citizenship, does the gentleman (Norton of San Francisco) say that New York would not have the right to prohibit the introduction of these negroes, or remove them from her borders? Has Texas the right to declare what New York shall exclude from her boundaries? Shall Texas interfere with New York or Georgia or any other state?" The case under consideration was exactly similar. In view of the bad character of free negroes, California proposed to exclude

them from her borders, but certain gentlemen claimed that she could not do so, because the New York constitution endowed them with the privileges of citizenship, and the Constitution of the United States declared that citizens of each state should enjoy the rights and privileges of citizens of the several states. In other words, the constitution of New York determined the rights of citizenship in California. The section in the Constitution of the United States was intended to protect the citizens of each state "in the enjoyment of those fundamental and inherent rights which it guarantees to all the citizens of the Union." It was not intended to interfere with the political regulations of different states. Such a construction would destroy the entire system of state sovereignty.¹

Snyder from Sacramento thought that he could show more clearly and perhaps more effectively than had been done, the real dangers which would threaten California if some provision were not made for keeping the negro out of the state. The average value of a negro in Missouri, he said, was about \$600. A slaveholder in Missouri or Kentucky expected to derive about \$160 profit each year from each able-bodied negro man. He would make his calculation on the basis of \$200 a year profit. Counting the average income from a slave at that rate, he would net his owner \$6800 from the age of sixteen to fifty, when he would become useless. This was deducting nothing on the chances of sickness or death. A man realizing a profit of \$6800 on each slave he owned would be doing well.

¹ Browne, *Debates*, 333-34.

But suppose the slave-owner should make a contract with his negro, agreeing to give him his freedom providing the slave would come to California with the master and serve four years in the mines. A working man could procure at least \$4000 a year in gold dust in the mines. At that rate a slave-owner could realize \$16,000 on each slave for four years' labor in the mines. "Do you suppose this will not be tried? It will, sir, and depend upon it, you will find the country flooded with a population of free negroes—the greatest calamity that could befall California. The evil effects . . . may not be felt for a number of years, but should the door be left open, the evil will come sooner or later." ¹

But arguments availed nothing. Other proposals were suggested at intervals as substitutes, but they attracted little notice. The opposition listened to the long speeches of the advocates, but voted as they had already planned: ² against the insertion of a clause in the constitution that would prevent the immigration of free negroes. Steuart had changed his ideas completely, and now suggested, as did others, that the whole thing be left to the Legislature.³ The final vote was taken and the proposed clause was rejected by thirty-one to eight.⁴

¹ Browne, *Debates*, 335.

² Willey, *Transition Period*, 94, says, "it was surprising how little members were influenced in their voting by speeches made in the Convention."

³ Browne, *Debates*, 337.

⁴ *Ibid.*, 339. The vote was as follows: *Yeas*—Carillo, Dent, Hill, Larkin, McCarver, McDougal, Wozencraft, President—8. *Nays*—Aram, Botts, Brown, DeLaGuerra, Dimmick, Dominguez, Ellis, Foster, Gilbert, Gwin,

An Analysis of the Forces

The true sectional character of the struggle did not manifest itself so much in the discussion immediately following the first reading as it did later when the subject came before the House a second time. Following the first reading of article four, the three leading speakers who opposed the insertion of the thirty-ninth section were from New York; of the six taking the most active part in favor of it, two were from Kentucky, two from Maryland, one from Louisiana, and one from New York. When the subject came up the second time, the two from Maryland,—Hoppe (a delegate from San José) and Steuart (a delegate from San Francisco)—both joined the opposition.¹ The significance of this change is obvious. Two southern men turned against the people of the mining districts with whose ideas on the free negro subject they would be expected to sympathize, and fought with those districts which opposed the mining interests. This is strongly indicative of two things: that there was no rivalry between the Old North and the Old South and that there was a struggle between the mining districts and the towns of San Francisco and San José. But this will become more evident as we proceed.

In the final vote on the original proposal, four northerners, three southerners, and one Californian voted to insert the Hanks, Hoppe, Hobson, Halleck, Hastings, Hollingsworth, Jones, Lippitt, Norton, Ord, Price, Pico, Rodriguez, Reid, Stearns, Sansevine, Steuart, Tefft, Vallejo, Vermeule, Walker.—31.

¹ See explanatory speeches made by Steuart and Hoppe. Browne, *Debates*, 337 and 338. Also votes on pp. 338 and 339.

thirty-ninth section; while fifteen northerners, nine southerners, five Californians, and two foreigners voted against it. Of the thirty-one votes cast against the measure, twenty-five represented the northern part of the territory and six, the southern; of the eight cast in its favor, seven were from the northern and one from the southern districts. This seems sufficient evidence to show that no sectional feeling existed so far as the Old North and the Old South were concerned.

It should be added, however, that the final vote can not be taken as showing the actual feeling of the delegates toward the admission of free negroes. Several of those who voted against the proposition would have been glad to see some provision for keeping the African out of California, but they were afraid that a clause to that effect might prevent admission to statehood. Others wanted to leave the matter to the Legislature, and advised the Convention to insert a clause in the constitution which would require that body to take some definite action in the matter.¹

Nor does a mere cursory examination of the final votes cast by the delegates from the mining regions and from the other districts show that a sectional struggle occurred between those places. As already indicated, the two principal mining centers were Sacramento and San Joaquin. Of the eight representatives sent by the former, two are given as voting on the affirmative, one on the negative, and five not at all; of the six delegates from the latter, one voted

¹ See speeches of Steuart and Hoppe, Browne, *Debates*, 337 and 338, already referred to.

on the affirmative, three are supposed to have voted on the negative, while two did not vote on the subject. The seven and eight delegates from San José and San Francisco all voted on the negative. Five of Monterey's six votes were on the negative. (Larkin did not vote.) Sonoma cast two of her three votes, and Los Angeles four of her five, on the negative. The other two votes from those sections went to the affirmative. One of the San Diego votes and one of the votes from San Luis Obispo also went to the negative. De-LaGuerra of Santa Barbara, Pedrovena of San Diego, and Covarrubias of San Luis Obispo did not vote. In other words, of the thirty-four votes from those districts outside of the mining region, twenty-eight were cast on the negative, four were not recorded, and two were for the affirmative. This indicates clearly that the districts outside of the mining region (San Francisco, San José, Monterey, Santa Barbara, Sonoma, Los Angeles, San Diego and San Luis Obispo) were well united in their opposition to the free negro clause. It remains to be shown that the mining regions were in favor of it.

The above analysis is made from the final vote recorded on the original proposal, which, at the first reading, had been adopted by the Convention. It does not consider the vote on the substitute which was taken just before, or the further votes to reconsider the original proposition and to introduce a new one which came up later. It will be necessary to consider all of these briefly in order to show that from the mining regions came most of the anti-negro party.

The leaders in the struggle against the admission of free

negroes were from the mining districts. They were McCarver, McDougal, and Snyder from Sacramento; and Wozencraft and Jones from San Joaquin. McCarver, McDougal, and Wozencraft are recorded as having voted for the original proposition. Their action throughout the whole controversy shows that they could not have voted any other way without being inconsistent. Snyder's name does not appear either for or against the original proposal, the substitute offered for it, or the motion to reconsider the final vote.¹ Just before the final vote was taken, however, he had made a strong speech in favor of preventing the immigration of free negroes.² There can be no doubt, therefore, as to his position on the subject. Jones's name is included among the opposition on the final vote, but it seems perfectly evident that he opposed the admission of free negroes. Just a little while before the final vote was taken on the original section he voted for McCarver's amended proposal, which has been quoted already,³ and which, it will be remembered, was word for word like the original, except that the former contained a proviso clause at the end. This proviso clause, placed there to conciliate those who were afraid the constitution of California might not be accepted by Congress if it contained a section against the immigration of free negroes, did not change the meaning of the section. Jones had just closed a strong argument, a summary of which has been given, in which he attempted to prove that the Convention

¹ Browne, *Debates*, 338, 339, 340.

² *Ibid.*, 334-36.

³ See above p. 121.

was not prohibited by the United States Constitution from inserting a clause against the immigration of free negroes.¹ It thus seems very improbable that he would oppose the original section simply because it did not have the proviso clause. His action immediately after the final vote was taken strengthens this opinion. He made a motion to reconsider the vote just taken, and of course voted for reconsideration when the motion was rejected. Just before the votes were taken on any of the above questions, Jones had declared that he represented a section (San Joaquin) which was "determined to carry this provision into effect,"² referring to the substitute for the original section. He was an extreme southerner and thoroughly believed in the "divine right of the slaveholder to the labor of the African race."³ That he would vote with the opposition seems too improbable to be credited.

Hastings of Sacramento voted with the opposition on the above question, but a short speech which he had made formerly on the subject,⁴ and a resolution which he offered after the original section had been rejected, indicate that he was in sympathy with the anti-negro party.⁵

¹ See above pp. 122-24.

² Browne, *Debates*, 332.

³ Bancroft, *History of California*, VI, 287.

⁴ Browne, *Debates*, 141-42.

⁵ The resolution, which was rejected, was as follows: "The Legislature shall pass such laws as may be deemed necessary, either prohibiting the introduction and immigration of free negroes to this state, or presenting the conditions upon which the introduction and immigration of such persons may be allowed." Browne, *Debates*, 340. It was offered after the question was supposed to be settled.

But perhaps no one thing shows the unmistakable leadership of the mining region in the attempt to prevent the immigration of free negroes more clearly than the attitude of Shannon. As we have seen already, he was opposed to inserting a clause which would prevent the negro race from coming to California; and during the early part of the struggle, he was leader of the opposition. He opposed the measure because he was perhaps more favorably inclined to the negro race than any other man in the Convention, and because he thought such a measure would be inconsistent with the declarations of freedom included in the Bill of Rights. In the first speech made by the opposition, he said that he presumed he would "stand alone in the minority on the subject."¹ This impression must have come from what he knew to be the general attitude of his constituents and from the opinions held by his colleagues, as it was too early in the discussion for him to know the general feeling of the Convention. Yet as the debates continued and as the true sectional character of the struggle began to manifest itself between the mining districts and the other parts of the territory, Shannon spoke less frequently, and finally was silent altogether. In the vote on the substitute, his name appears among those favoring the insertion of the section, but in the final vote on the original proposition, a measure which he had fought so bitterly at the beginning, he could but remain silent.²

It is evident, then, that the final vote rejecting the original

¹ Browne, *Debates*, 143.

² *Ibid.*, 338 and 339.

anti-negro clause does not indicate the actual struggle which occurred between the mining region and the other districts under the leadership of San Francisco and San José. In regard to the latter, we have already shown that there can be no doubt that they were united in the struggle.¹ Concerning the former, only two of the fourteen delegates who represented that section—Hollingsworth and Vermeule from San Joaquin—showed by their votes that they were not in sympathy with the anti-negro party. Of the seven whose votes are not recorded we know that Snyder had indicated his sympathy with his colleagues and that Shannon actually cast one vote with them, probably yielding his personal opinion for the sake of his constituents. It certainly is not impossible, in fact it seems very probable, that some of the other five held views which were in accord with the majority of their colleagues.

It will thus be seen that the free negro question was not put to one side as easily as the historians of the period have indicated. It was one of the important questions considered by the Convention, and was the first to involve a discussion of any consequence. It is of additional interest because it shows how old party lines were broken up and new ones formed by men who went into the far West from different sections of the Union. In their home states party affiliations and local institutions were given first consideration; in their new environment a common feeling of the necessity of union took precedence over all other interests.

¹ See above pp. 127-28.

CHAPTER VII

DETERMINING THE EASTERN BOUNDARY

No subject that came before the Convention consumed more time, stirred up greater rivalry and came so near producing a riot as did the settlement of an eastern boundary for California. It was this question, too, over which sectionalism (*i. e.*, sectionalism between the Old North and the Old South) is generally believed to have manifested itself most. Historians have asserted that the management of the Convention was in the hands of southern men,¹ and invariably they drew their deduction from the boundary controversy. We shall see, however, that such conclusions are not based on facts.

The Boundary of California Under Spain and Mexico

California probably had no established eastern boundary under the Spanish government.² The explorations of Garces' through southern Nevada, as shown on Padre Font's map of

¹ Bancroft, *History of California*, VI, 286. Royce, *California*, 262 *et seq.* A recent writer goes a step farther and asserts that "more than half of the delegates had originated in states below the Mason and Dixon line." Coman, *Economic Beginnings of the Far West*, II, 248.

² Bancroft, *History of Arizona and New Mexico*, 345, says: "California, however, while no boundary was ever fixed officially, was not generally considered to extend east of the Rio Colorado."

1777,¹ and of Dominguez and Escalante through Utah and southeastern Nevada ² had doubtless given the Spanish officials a vague notion of the interior basin of Upper California, and the decrees of the viceroys, according to Halleck, included that region in the judicial district of the California territory.³

Even when Mexico became independent of Spain, the boundaries of her northern provinces, California and New Mexico, were not established with any great degree of precision. For instance, there were two maps of Upper California published in 1837. Rosa's, published by order of the Mexican Congress, shows the southern boundary by a line running south of west from the mouth of the Gila river to the vicinity of latitude 30°, 30' on the Pacific coast. The eastern boundary begins at the mouth of the Gila river and runs northeast, joining the 42nd parallel at the 108th meridian. The Dufour map indicates no boundary between Upper and Lower California. The eastern boundary, beginning near the 33rd parallel, runs northward between 112° and 113° of longitude to the vicinity of the 36th parallel of latitude, then turns west of north and joins the 42nd degree of north latitude on longitude 116° west. The northern boundary, according to Rosa's map, extends from longitude 108° west from Greenwich, westward along the 42nd parallel to the Pacific; while on Dufour's, the same boundary includes only the territory

¹ Bancroft, *History of Nevada, Colorado and Wyoming*, 28 et seq.

² *Ibid.*, 36 and *History of Utah*, 7 et seq.

³ Browne, *Debates*, 451-52.

along the 42nd parallel between 116° west longitude and the Pacific ocean.

Tanner's *Map of the United States of Mexico* and Mitchell's *Map of Mexico including Yucatan and Upper California*, both published in 1846, give California similar eastern boundaries, but these differ considerably from the eastern boundaries of the maps published in 1837. The eastern line runs rather irregularly between 30° and 31° , $30'$ of longitude west from Washington from about the 32nd to the 42nd parallels of latitude. Another map drawn by Charles Preuss from the surveys of John C. Frémont and other authorities (Washington, 1848)—the one which seems to have been used more frequently than any other by members of the Convention—indicates still different boundaries.¹ The southern line, beginning on the Pacific coast, about one marine league south of San Diego, runs almost east and west to the Gila river, and along that stream to the vicinity of the present town of Tempe, Arizona, near the 112th degree of longitude west from Greenwich. The eastern line extends northward through Utah, just west of Bear Lake, to the 42nd parallel of north latitude. The map used by the United States and Mexico in establishing the boundaries in 1848 was Disturnell's *Mapa de los Estados Unidos de Mejico, California*, etc. (New York, 1847). The edition of this map used by the writer, which seems to have indicated the same boundaries for California as the one just cited, was published in 1850. On it the eastern line begins near latitude 32° , $30'$ north, and longitude 31° . west from

¹ This map may be found in *California Message and Correspondence*, 1850.

Washington, and extends northward, at one place coming near longitude 33° , finally joining the 42nd parallel near longitude 31° west from Washington. The map accompanying the President's *Message to the two Houses of Congress*, December 5, 1848, is very similar to the Disturnell map, except that the former follows the Suanca branch of the Gila river instead of the middle branch, thus including in California more territory in the southeast than the latter. The Disturnell map also extends the northwestern boundary of New Mexico slightly more than does the map accompanying the President's message.

These maps published at different periods all agree in making the 42nd parallel the northern boundary of California—the line established by the United States and Spain in the treaty of 1819—but that is about all they have in common. As we have seen, they show the eastern boundary at the north touching the 42nd parallel anywhere between longitude 116 west from Greenwich as indicated on Dufour's map and 108 as shown by Rosa.

Boundaries Proposed by the Convention

The eastern boundary of the ten districts into which California was divided by Governor Riley's proclamation, was drawn along the Colorado river and the Coast and Sierra Nevada ranges of mountains. Among a majority of the delegates, however, there was a general feeling that the state which they were forming need not be confined to these limits. On September 12th, therefore, the Convention au-

thorized the President to appoint a committee whose duty it should be to propose satisfactory boundaries for the new commonwealth. The members chosen were men supposed to be familiar with the geography of California as it existed under Mexico. They were Hastings and Sutter of Sacramento, Rodriguez of Monterey, De la Guerra of Santa Barbara, and Reid of Los Angeles.¹ Hastings submitted the report for the committee on September 18th.

The territory of California as it existed under Mexico, the report declared, should not be formed into one state. The reasons for opposing its formation into a single state were (1) it was too extensive to be fairly represented in a state Legislature; (2) the subsequent divisions, which were almost certain to occur if the Convention included so much territory within the boundaries of a single state, might deprive California of a valuable portion of her sea coast; and (3) the Mormons, comprising about thirty thousand people who lived in the northeastern part of the territory, were not represented in the Convention. That body, therefore, had no right to include them in a state which they had no part in forming. The 116th degree of west longitude between the 42nd parallel of north latitude and the boundary line between the United States and Mexico as established by the treaty of Guadalupe Hidalgo, was recommended as the most satisfactory eastern boundary for the new state.²

¹ Browne, *Debates*, 54.

² *Ibid.*, 123-24. The establishment of this eastern boundary has been worked out in detail by the author in the *Southwestern Historical Quarterly*, Vol. XVI, No. 3, January, 1913.

Following the report the House adjourned, and although the Convention held daily sessions during the interval, the boundary question did not come up again until September 22nd.¹ At that time McDougal warned the members that numerous proposals would be submitted, and suggested that all who intended to recommend lines for the eastern boundary should do so at once. He did not agree with the committee himself, but without attempting to explain the one which he considered the proper boundary, he would simply offer his amendment. He suggested the 105th degree of longitude west from Greenwich between the 32nd and 42nd parallels of north latitude as the eastern boundary for the new state. But if Congress refused to admit California with these extensive limits, then he recommended the 120th degree of longitude from the 42nd parallel to the 38th; thence to run in a straight line in a southeastern direction to the boundary line between the United States and Mexico.²

Samuel of Sonoma said that he considered the problem of establishing a satisfactory eastern boundary, if the line did not extend west of the Sierra Nevada mountains, a subject of secondary importance. He thought, therefore, it would be well for the Convention to fix definite boundaries north and south and leave the eastern line to be determined by Congress. Personally he felt that the only portion of the territory which should be included was that part west of the Sierra Nevada mountains. If Congress wished to include the whole of Spanish California, however, he thought it

¹ Browne, *Debates*, 167.

² *Ibid.*, 168.

would be better to accept the desire of that body rather than risk having to remain out of the Union for three or four years. It was important to procure a regularly organized government, and this could be obtained more quickly by omitting everything from the constitution which would tend to stir up sectional prejudices in Congress.¹

The eastern boundary as indicated on the Preuss map was then recommended by Gwin. Halleck amended it, however, by attaching a proviso making it possible for the state Legislature "to accede to such proposals as" Congress might make regarding a boundary, after California was admitted into the Union. The eastern line, however, was not to extend west of the Sierra Nevada mountains.²

Believing that many difficulties would arise in connection with the boundary question, Gwin said he had devoted much time to a careful study of the subject. He had maps which he had laid before the citizens of California "who were well versed in the matter, and they had informed him that the boundary which he proposed" was the one recognized by the government of Mexico. It had already been recognized by the United States, he said, in official documents and maps published by order of Congress. It was essential to state a definite boundary in the constitution, "but as this was a fair subject of negotiation between the two high contracting parties, and as Congress had a right to determine what our boundary should be, . . . then it was fair for Congress and the Legislature, under the proviso, to change it

¹ Browne, *Debates*, 168.

² *Ibid.*, 169.

by their joint action.”¹ It was true that his proposition included an immense territory, but the people of California could divide it later into several states if they so desired.

Shannon suggested a boundary similar to the second part of McDougal's proposal and very much like the one finally adopted. The eastern line was to be the 120th degree of west longitude from the 42nd to the 38th parallel of north latitude, thence southeast to the point of intersection of the 35th parallel of north latitude with the Colorado river, thence south along the eastern bank of that stream to the boundary line established between the United States and Mexico.

This would include every point which was of any real value to the state. The Colorado river, which would belong to California, would be of great importance as a southern “port of entry and depot for trade” between the interior provinces of Mexico and the new state, besides giving the latter a uniform width and bringing it within reasonable limits.²

About two weeks later, October 8th, after the suggested boundaries had been discussed and the Gwin-Halleck proposal had been accepted, Ellis moved that the report of the committee of the whole on the boundary be taken up, and Hastings offered a substitute for the line adopted. It was the 118th degree of west longitude between the 42nd and the 38th parallel, thence southeast in a direct line to a point where the 114th meridian intersected the Colorado river,

¹ Browne, *Debates*, 169.

² *Ibid.*, 170.

thence down the main channel to the boundary line between the United States and Mexico.¹

An attempt was made to discuss the proposition, but Botts interrupted by saying there was an understanding that a vote was to be taken upon the question without debating it.² He wanted either no debate or a full discussion of the subject. This led to an immediate vote which resulted in the adoption of the substitute offered by Hastings.

But objections were raised immediately. McDougal moved that the article on the boundary be reconsidered, and Sherwood made a long speech favoring such action.³ Speeches were made by others, and on the following day Hastings's proposal was rejected by a majority of ten in a total vote of forty-four.⁴ Shannon then submitted the proposal which he had formerly read and it was also rejected. The question reverted to the Gwin-Halleck proposal and it was adopted for the second time.⁵

The announcement of this vote led to the only scene of disorder that occurred during the entire session of the Convention. "A dozen members jumped up, speaking and shouting in a most confused and disorderly manner. Some rushed out of the room; others moved an adjournment; others again protested they would sign no constitution embodying such a provision."⁶ Again the subject was

¹ Browne, *Debates*, 417.

² *Ibid.*, 418.

³ *Ibid.*, 418-20.

⁴ *Ibid.*, 433.

⁵ *Ibid.*, 440-41.

⁶ Taylor, *Eldorado*, II, 153-54. See also Browne, *Debates*, 441.

reconsidered and various proposals were suggested, only two of which received serious consideration. These were offered in a spirit of compromise by Jones of San Joaquin and Hill of San Diego.

Jones believed that every member of the Convention wanted to avoid raising any question in Congress which might delay the admission of California, and he thought there was also a general feeling that the Sierra Nevada would be the most natural boundary. But there were some who insisted upon fixing that as the definite boundary, making no provision for any difficulty in Congress; while others wanted to add a proviso clause so that if Congress did not accept the Sierra Nevada line, they would still have an opportunity to gain admission to statehood without experiencing serious delay. Why not compromise? Why not adopt the Sierra Nevada line with a proviso? That is, why not make it very clear to Congress that the people of California much prefer the Sierra Nevada line for their eastern boundary. But if Congress should refuse to admit the state into the Union with that line, "if it should prove an insuperable barrier to our admission," then "we will take a larger."¹ He then suggested practically the same eastern limits offered by McDougal and Shannon: the 12th degree of west longitude beginning at the 42nd parallel and extending to the 39th, thence in a straight line southeast to the intersection of the 35th degree of north latitude and the Colorado river, thence down the middle of the channel of that river to the boundary line between the United States

¹ Browne, *Debates*, 441-43.

and Mexico. But if Congress would not accept this line, he suggested as a substitute the eastern limit as indicated on the Preuss map of Oregon and Upper California.¹

Botts was willing to compromise, but Jones's proposal involved a principle on which he could not yield. He would strenuously oppose any proposal that included the Mormon settlements, because these people had no representatives in the Convention.²

To meet this objection and to satisfy those who insisted that a single, definite boundary be adopted, Hill submitted as the eastern limit a line following the Colorado from the mouth of the Gila to the 35th parallel and thence north to the 42nd degree of north latitude.³ Jones's proposal was rejected by a majority of eighteen in a total vote of forty-four, and Hill's was adopted by a two majority in a total of forty-six.⁴ The subject was again reconsidered, however, and for the third time the Convention voted on the Gwin-Halleck proposal. It was voted down by a majority of six in a total of forty-two votes.⁵ Jones then offered the first part of his proposal and it was accepted as a final settlement of the boundary question by a vote of thirty-two to seven.⁶ The boundary thus established was as follows:

"Commencing at the point of intersection of the 42nd degree of north latitude with the 120th degree of longitude

¹ Browne, *Debates*, 443.

² *Ibid.*, 447.

³ *Ibid.*, 454.

⁴ *Ibid.*, 456-57.

⁵ *Ibid.*, 458.

⁶ *Ibid.*, 458 and 461.

west from Greenwich and running south on the line of said 120th degree of west longitude until it intersects the 39th degree of north latitude; thence running in a straight line in a southeasterly direction to the river Colorado at a point where it intersects the 35th degree of north latitude; thence down the middle of the channel of said river to the boundary line between the United States and Mexico, as established by the treaty of May 30, 1848; thence running west and along said boundary line to the Pacific ocean and extending therein three English miles; thence running in a northerly direction and following the direction of the Pacific coast to the 42nd degree of north latitude; thence on the line of said 42nd degree of north latitude to the place of beginning; also all the islands, harbors and bays along and adjacent to the Pacific coast.”¹

The Nature of the Discussion

The arguments made by the proponents of the different boundaries have already been given. It is now in order to indicate the nature of the discussions which the proposals aroused.

The first part of McDougal's proposition, suggesting the 105th degree of west longitude as the extreme eastern limit for the new state, seems to have been given little or no consideration. The party favoring the line recognized by Mexico urged the acceptance of the Gwin-Halleck proposal, thus declaring themselves in favor of the line laid down on the

¹ Browne, *Debates*, 443.

Preuss map of 1848. The other party wanted to prescribe narrow limits, but at first they could not agree on a satisfactory line. Some spoke in favor of the proposal submitted by the committee—the 116th degree of west longitude—and others for contracting the boundary still more.¹ The principal points of the argument were very similar on both sides; immediate admission to statehood, slavery, the right of the Convention to fix any other eastern boundary than that recognized by Mexico, and the question of including or excluding the Mormon settlements around Salt Lake. The small state party also expressed the fear of division by an east and west line. Throughout the discussion, both sides were actuated especially by a desire to gain quick admission into the Union. The majority of those favoring the extreme eastern boundary seem to have believed that Congress would accept them immediately with that line. The opposition was just as certain that immediate admission could be secured only by bringing the territory of the state within reasonable limits.²

McCarver said the important thing was to do nothing that would delay their admission into the Union. "We want our two senators in the senate chamber to maintain the interests and supply the wants of California; we want our representatives in Congress as early as we can." To accomplish this it was absolutely necessary to fix definite and permanent boundaries north, south, east and west. They should leave no boundary open; they should leave no ques-

¹ *Johns Hopkins University Studies*, XIII, 405.

² See Willey, *Transition Period*, 108.

tion open that would be the means of keeping them out of the Union. Furthermore he would like to arrange it so that the Legislature would entertain no proposal from Congress for fixing a boundary. He was afraid Congress might cut the state in two by running a line east and west if the Convention adopted the Gwin-Halleck proposal.¹

¹ Browne, *Debates*, 170, 177. Other members expressed similar fears regarding the division of the state east and west.

Polk, in his message of December 5, 1848, had recommended the extension of the Missouri Compromise line to the Pacific as a means of settling the slavery controversy, and the Senate attempted to get such a measure through Congress, but the House would not accept it. (Rhodes, *History of the United States*, I, 96 and 97.) Later southern men in Congress attempted to save a portion of the newly acquired territory for slavery in another way. On August 1, 1850, when the bill for the admission of California was under discussion in the Senate, Foote of Mississippi offered an amendment to an amendment which had been proposed by Douglas, the latter being in relation to the disposal of public lands in California. Foote's amendment was as follows: "And that the said state of California shall never hereafter claim as within her boundaries, nor attempt to exercise jurisdiction over, any portion of the territory at present claimed by her, except that which is embodied within the following boundaries, to wit: Commencing in the Pacific ocean, three English miles from the shore, at the 42nd degree of north latitude; thence with the southern boundary line of the territory of Oregon to the summit of the Sierra Nevada; thence along the crest of that mountain to the point where it intersects the parallel of latitude of 35° 30'; thence with the said parallel of latitude to a point in the Pacific ocean three English miles from the shore, and thence to the beginning, including all the bays, harbors and islands adjacent to or included within the limits hereby assigned to said state. And a new territory is hereby established, to be called Colorado, to consist of the residue of the territory embraced within the limits of the said state of California, specified in the constitution heretofore adopted by the people of California; for the government of which territory, so established, all the provisions of this act relating to the territory of Utah, except the name and boundaries therein specified, are hereby declared to be in force in said territory of Colorado, from and after

Price of San Francisco also asserted that the first object the Convention wished to accomplish was to gain immediate admission into the Union. Could they do it by adopting the extreme eastern boundary offered in the Gwin-Halleck proposition? He did not think so. The southern representatives in Congress would not accept it. He came from a northern state (New Jersey), but he was broad enough to see the injustice of such a measure in so far as it affected the South.¹

Semple wanted to do everything possible to secure the immediate admission of California into the Union² and Halleck believed his proviso clause would secure immediate admission to statehood. Semple seems to have felt that Gwin's proposal alone might not be accepted by Congress, but with this provision added to it, he thought there could be no question. He believed Congress would accept it unhesitatingly.³ Sherwood of Sacramento thought California could not be admitted to statehood very soon if she refused to adopt the extreme eastern limits. To establish the Sierra Nevada or a line of longitude near those mountains as the

the day when the consent of the state of California shall have been expressed in some formal manner to the modification of her boundaries." *Congressional Globe*, 31st Cong., 1st sess., Appendix II, p. 1485.

In commenting on this, Butler of South Carolina said: "Thirty-six degrees and thirty minutes is that which has been often indicated as the line; this is arbitrary, and if it becomes a point of honor, I will insist upon it. This proposition, 35° 30'," has eternal boundaries to indicate it, and for that reason, he said, he would accept it. *Ibid.*, 1489.

¹ Browne, *Debates*, 429-30.

² *Ibid.*, 168.

³ *Ibid.*, 175.

eastern boundary of the new state would result in one of two things: they would either be left without a government by Congress, or they would have to form a government for themselves independent of Congress.¹

On the other hand Botts could hardly "keep cool" when the subject was broached. He did not believe they stood any chance whatever of becoming a state with the Rocky mountains as their eastern line. "The gentleman who has last taken his seat (Mr. Sherwood), has made his strongest appeal in behalf of this extreme eastern boundary; that it will be the only means of getting you into the Union. Sir, I can tell you this will not be the means of your admission; you will never get into the Union with this boundary. If you do, it will be only to sit amongst its ruins, like Marius among the ruins of Carthage."²

Halleck did not believe the joint proposal was understood, and wanted to explain it. The first part, that offered by Gwin, included what had always been recognized as Upper California. The object of extending the boundaries of the new state to the extreme limits, was to settle the slavery question in that vast area forever. Another reason was to extend the jurisdiction of the courts of the state to that region for the purpose of protecting the immigrants who were coming from the East in such great numbers. He did not believe it would be possible to get a government for the territory between the Sierra Nevada range and the Rocky mountains for the next five years if the question of slavery

¹ Browne, *Debates*, 181 and 418-420.

² *Ibid.*, 420.

were left unsettled there. Probably a half dozen or a dozen murders had been committed in that section during the past year; where could justice be meted out to the guilty, and to others who would be guilty of similar crimes in the future, if the eastern boundary of California did not include that region? These were the reasons urged for fixing an extreme eastern boundary. But some members had asserted, and perhaps truly, that Congress would not admit California with this boundary. His proviso clause was to meet just that difficulty. If objections were made to admitting a state which included so much territory, the constitution carried with it provisions for establishing a new eastern boundary anywhere between the Sierra Nevada and the Rocky mountains, the exact location to be determined by Congress and by the Legislature of California. Thus the new state would gain immediate admission with the extreme eastern limit, and if these limits were to be restricted, Congress and the state Legislature could fix a new line later.¹

Botts had been inclined to leave the settlement of the eastern boundary to Congress, but, he said, since a member of the "new firm of Gwin and Halleck" had explained the motives which actuated them in offering the proposal before the House, he had had just and sufficient reasons for changing his mind. Did the gentleman (referring to Halleck) suppose southern men were asleep? Why did he not, upon the same principle, attempt to settle the question for Congress and for the southern people over a still greater extent of territory? Why not indirectly settle it by extending the

¹ Browne, *Debates*, 175.

eastern boundary of California to the Mississippi river? Why not include the island of Cuba, "a future acquisition of territory which we may one day or other attain, and forever settle this question by our action here?"

Slavery, he continued, was a great evil, and for that reason he wanted it excluded from the state in which he lived, but the territory of that state should be confined within "proper" limits. He believed the people of a territory had a perfect right to form a state government and exclude the institution of slavery from their midst; and he was willing to vote for the Rocky mountains as the eastern limit of California if gentlemen could show him that that was the proper boundary for the new state. "But when gentlemen urge upon me as an argument, to adopt that boundary because it excludes slavery from an immense extent of territory; not because it is the proper boundary of California, not because it is desirable to the state of California, but because it will settle the slavery question for the whole of the southern people and that against the will of the inhabitants of that portion of the Union who are not represented here—the millions of people there who desire to have the institution of slavery amongst them—when we are told that this may be, and that we here now may adopt that boundary and prevent the people of the South who may come here from exercising their rights and determining the question for themselves—when I am urged to do this, sir, I cannot give my consent." ¹

Sherwood thought the crest of the Sierra Nevada or some

¹Browne, *Debates*, 178-179.

line of longitude near it should be the future boundary of the state; and if that were the only question before the House, he would not hesitate to vote for the proposition which established such a boundary. But there were other things which should influence the action of members of the Convention. The most important of these was the slavery question. The fact that Congress had failed to provide a territorial government for California during its last session was due entirely to the controversy over the subject of slavery. That subject, so far as it affected the territory to be included within the new state, had been settled by a unanimous vote of the Convention. Why not complete the good work by extending their eastern boundary to include the whole of California? If this were not done, the discussion of the same question would be open in regard to that portion of California excluded from the limits of the new state.¹ As friends

¹ It will be remembered that the treaty which closed the Mexican War was signed February 2, 1848. On July 13th following, a special committee of eight members, representing equally the North and the South, was appointed by the Senate, and that part of President Polk's message relating to California, Oregon, and New Mexico was referred to them. On July 19th, Clayton of Delaware introduced a bill in the name of the committee. In his introductory report, he informed the Senate that the principle of the extension of the idea of the Missouri Compromise to the whole territory had been approved by a vote of five to three in the committee, but that a motion to treat the part of the newly acquired territory lying south of 36° 30', as far as related to slavery, in the same way that Louisiana territory had been treated, was lost by four to four. All hope of a compromise disappeared and the committee decided to make only general provisions for the territories and leave the slavery question to itself. Its recommendations were as follows: first, to recognize the provisional laws of Oregon until a law of the territorial legislature should either allow or

of the Union he appealed to members of the Convention to settle the question for the whole territory and thus relieve Congress of the responsibility. If they did not settle it several years might elapse before a government could be organized in California.

Sherwood then spoke at length upon the excitement which the subject of slavery had created in the eastern states during the preceding year, especially in his native state, New York. In that state opinion had been divided as to whether Congress should pass a proviso prohibiting slavery in all the territory acquired from Mexico. A large party there believed that Congress had no right to pass such a measure. It was a subject, they said, which the people of each territory should determine for themselves. The other party declared that Congress had a right to settle the slavery question for territories. A candidate had been nominated for the presidency there with the distinct understanding that he would favor the Wilmot proviso.¹ The great excitement which had begun during the presidential election of the preceding year would continue unless members of the Convention settled the slavery question for the whole of the

prohibit slavery; second, to organize California and New Mexico as territories, but to withhold from the territorial legislatures the right to make any decision with regard to slavery. See Von Holst, *Political and Constitutional History of the United States*, III, 385-386.

¹ This was Van Buren. The Democratic party of New York split into two factions—the Barnburners and the Hunkers. In the presidential election of 1848, the former declared for the Wilmot proviso, the latter against it. Van Buren was nominated by the Barnburners, and later by the Free Soil party. See Stanwood, *History of the Presidency*, ch. 18.

territory of California by extending their eastern boundary to the Rocky mountains.¹

The attitude of the administration and of Congress on the subject, Semple thought, might be of interest to members of the Convention. He was in a position to give this in so far as he could get it from a conversation which he had had with Thomas Butler King, a member of Congress and President Taylor's confidential agent to California. He had asked King what Congress would have them do, and had told him that the people of California did not want to extend their eastern boundary beyond the Sierra Nevada, that they would prefer to exclude from their limits all that desert waste east of the mountains. "For God's sake," King had replied, "leave us no territory to legislate upon in Congress." King "went on to state then that the great object in our formation of a state government was to avoid further legislation. There could be no question as to our admission by adopting this course; and that all subjects of minor importance could afterward be settled."²

¹ Browne, *Debates*, 180-182.

² *Ibid.*, 184. In his message to the House of Representatives, January 24, 1850, President Taylor said that while he had recommended the formation of state constitutions and application for admission into the Union in the case of both California and New Mexico, he had not in any way attempted to influence them in the formation of their domestic institutions. "On the contrary, the instructions given by my orders were that all measures of domestic policy adopted by the people of California must originate solely with themselves." Richardson, *Messages and Papers of the Presidents*, 1789-1897, Vol. V. In spite of this message, however, there is some reason to believe that President Taylor's wishes and those of his cabinet were expressed by King in his conversation with Semple, even more than were the wishes of Congress. In Whitney's *History of Utah* (I, p. 408) is a letter

Shannon claimed that the dignity of the new state would not permit it to receive dictation of this character from

written at Salt Lake City and dated September 6, 1849. It is addressed to Brother Amasa Lyman and signed by Brigham Young, Heber C. Kimball, and Willard Richards. It is in part as follows:

"On the 20th of August, General Wilson arrived here, on his way to California, as general Indian agent, etc. We had an interview with him and gathered from him the following particulars: That the President and Council of the United States are friendly disposed to us, and that he (General Wilson) is commissioned by General Taylor to inform us that he fully appreciates our situation," etc.

"The main point of the matter, however, is this: The President has his ends to subserve, and as he knows we have been favorable to his election, he wishes further to appeal to our patriotism (so says General Wilson) to help him to carry out another measure, which will deliver him, the cabinet and the nation from a difficulty in which he thinks they are likely to be involved.

"The subject of slavery has become more embarrassing than it ever has been before. The addition of the extensive territories of New Mexico and Upper California increases that difficulty. . . . The subject will be first, probably, broached in Congress, and if some active measures are not adopted, they (the President and cabinet) fear it will be the last and only question. If it should be made into territories, it will be under the direction of the United States, and the question of slavery will annoy and distract all parties, and General Wilson says they fear will have a tendency to break up the Union.

"To prevent this they have proposed a plan of making the whole territory into one state, leaving it to the power of the people to say whether it shall be a free or a slave state, and thus taking the bone from the Congress of the United States, and leaving them to pursue their course, 'peaceably if they can,' undisturbed by this exciting question. They think it ought to be made into two states, but that the sparseness of the population at the present time would preclude the possibility of an act of that kind passing.

"The cabinet think that all parties would agree to a measure of this kind if it should become a free state, and even General Wilson, the President, and other slaveholders are anxious that it should take this turn and are willing to make a sacrifice for the public good. He supposes that even southern members would go in for it, but without our help, they think it could not be

Thomas Butler King or from anyone else. What right had King to tell the members of that Convention that if they adopted such and such boundaries they would be admitted into the Union; if they did not, they would fail to become a sovereign state? He considered it not only an insult but a threat, and he called upon the Convention to have enough regard for their own dignity and for the dignity of the state of California to reject such an offer immediately. He did not believe for a single moment that King expressed the sentiment of the Congress of the United States. No single individual could do that. The truth of the matter was, he thought, that the cabinet was in difficulty over the Wilmot

accomplished. They think that there would be a strong southern influence used on the coast, calculated to place the matter in an embarrassing situation to them and the eastern population on the coast combined, but that by our influence we should be able to counterbalance that of the slaveholders, and thus settle the troublesome question. It is therefore their policy to seek our influence, and we need not add it is our policy to use theirs.

"In our communications with General Wilson, we at first rejected altogether the idea of any amalgamation whatever with the government on the coast, but on the subject being presented in another form, we have agreed to the following:

"We are to have a general constitution for two states. The boundaries of the one mentioned by us, before referred to, is our state, the other boundaries to be defined by the people of the coast, to be agreed upon in a general convention; the two states to be consolidated into one and named as the convention shall think proper, but to be dissolved at the commencement of the year 1851, each one having its own constitution, and each becoming a free, sovereign, independent state, without any further action of Congress.

"You will act as our delegate, in conjunction with General Wilson. Brother Pickett is also a delegate."

That is, they were to serve as delegates to a constitutional convention to be held on the coast. Lyman was instructed to block any attempt to unite Deseret and California on terms other than the ones specified above.

proviso, and that King—perhaps others—was sent there to influence the people of California, first to establish a state government, and second to include the entire territory within their limits. There was a political quarrel at home into which the President and his cabinet wished to bring the new state of California. For his own part he wished to keep as far from such “rocks and breakers” as possible.¹ The letter given above will show that probably Shannon was not far from the truth.²

There were others besides Shannon who seemed to think that the question before the House should not be connected with national affairs. Regardless of slavery and regardless of the opinion held by President Taylor’s confidential agent, did the Convention have a right to fix boundaries for the new state of California other than those recognized by Mexico as the limits of the territory while it was a part of that government? Norton believed not. He held as a first principle that the Convention was not at liberty “either to take one acre of land more than now belongs to California or to yield one acre that now belongs to it.” No authority had been delegated to them and they had no right to assume power to give up any territory which had been included within the established limits of California. If they were there to form a constitution for California, they were there to form a constitution for the whole of it, not a part. “I insist, sir, that we have no right to say that California is not the California we took her to be when she became part and parcel of the

¹ Browne, *Debates*, 191.

² See pp. 153-55, note.

United States." He thought it might be possible later, if Halleck's proviso were accepted, to divide the territory; but this would have to be done by a joint action of Congress and the state Legislature—the Convention could not do it.¹

Such arguments were absurd, McCarver exclaimed. Suppose the convention which formed the constitution for Louisiana had, for similar reasons, attempted to include the whole of the Louisiana territory within the limits of the state. The two countries, Louisiana and California, stood upon the same footing. Both had been obtained by treaty, one from France and the other from Mexico. Both contained territory enough for several states. Would it not have been a "monstrous doctrine" for Louisiana to insist that the whole of that vast territory belonged to them, and that therefore they would include it all within the boundaries of their state? "We occupy a similar position here. We have a tract of country purchased either by the blood or treasure of the United States, known as California." To imagine that Congress would permit them to include it all within the boundaries of their state was the most absurd of absurdities.²

Furthermore, the eastern boundary had already been designated, Botts urged. "General Riley proclaimed the eastern boundary of California in his proclamation, and the people said amen. I say that he, in his proclamation, called upon the people of California in pursuance of instructions, if you please—California as laid down in certain prescribed lines—to form this Convention, and they, through their

¹ Browne, *Debates*, 185-187.

² *Ibid.*, 187.

representatives, have excluded slavery for themselves; and is it for you, sir, now to reverse that decision?" He did not believe the Convention could do it. Most assuredly the people living within certain limits had no right to make rules for people beyond those limits. Such an act would violate every republican principle of justice. "Why, sir, is it necessary at this day, in this enlightened country, to stand here and argue and prove that people can make laws only for themselves? I am ashamed of the position that I am compelled to occupy." ¹

Lippitt of San Francisco also felt strongly on the subject. The Convention, he said, had no right to extend their government over the inhabitants of the Salt Lake region, comprising some thirty or forty thousand Mormons who had never been consulted in making the constitution. ²

It was a new doctrine, said Gwin, that every man must be represented within the borders of a new state, a doctrine which he believed had never been preached before. Great stress had been laid upon the fact that the Mormons were not represented. There was no proposition to force the Mormons to become a part of the government of California. He did not propose to extend the laws of the state or of any district in the state to the Mormons. He did not propose to send tax collectors or government officers there. He favored awaiting their own action in the matter. If they wanted the benefit of the government which was being established, they should send a petition to have representatives allotted

¹ Browne, *Debates*, 422-423 and 447.

² *Ibid.*, 448.

to them. "If they desire the protection of our laws, let them send to us, and it will then be a matter of inquiry on the part of our state government." But he thought the Mormons would have no right to complain. The people whose representatives composed the Convention were the majority, and the majority of the people of any state had a right to make rules for the minority. As a matter of fact, thousands of immigrants had reached California since delegates were elected to the Convention. They, too, had no representation in that body, but as a minority they were bound to submit to the will of the majority. Would not these people have as much right to complain as the Mormons? ¹

Shannon thought not. He did not see how the fact that the Mormons were in the minority would prevent them from offering legitimate objections to being included within the new state. They could justly claim that they had no part in making the constitution which that Convention was framing. But even if they should accept the work of the Convention, he did not think that they should be included, because of their peculiar religious beliefs.² And there was another objection even more serious, said Hastings. The Mormons had already applied to Congress for a territorial government. Suppose both applications should be brought before Congress at the same time—"we apply for a state government and they for a territorial government"—both petitions coming from the same territory. Would it be

¹ Browne, *Debates*, 194-196.

² *Ibid.*, 170-171.

possible for California to be admitted into the Union claiming the same territory at the same time that the Mormons were asking for a territorial government over it? Most assuredly not.¹

The Mormons and the Boundary

In the meantime the Mormons had not been idle. A convention was summoned in Utah early in 1849, and the inhabitants of that part of Upper California lying east of the Sierra Nevada were urged to send representatives.² On the 4th of March the delegates assembled at Salt Lake City. A committee was appointed to draw up a constitution under which the people might govern themselves until Congress should provide a government for them”³ by admitting them into the Union.”⁴ The name of the new state was to be Deseret,⁵ and its boundaries were to be as follows:

“Commencing at the 33rd degree of north latitude, where it crosses the 108th degree of longitude, west from Greenwich; thence running south and west to the northern boundary of Mexico; thence west to and down the main channel of the Gila river (on the northern line of Mexico), and on the northern boundary of Lower California to the Pacific ocean; thence along the coast northwesterly to 118° 30' of west longitude; thence north to where said line intersects the dividing

¹ Browne, *Debates*, 173.

² Bancroft, *History of Utah*, 440.

³ *Ibid.*

⁴ *Journals of California Legislature*, 1850, 1st sess., p. 443.

⁵ *Ibid.*

ridge of the Sierra Nevada mountains; thence north along the summit of the Sierra Nevada mountains to the dividing range of mountains that separate the waters flowing into the Columbia river from the waters running into the Great Basin; thence easterly along the dividing range of mountains that separate said waters flowing into the Columbia river on the north from the waters flowing into the Great Basin on the south, to the summit of the Wind river chain of mountains; thence southeast and south by the dividing range of mountains that separate the waters flowing into the Gulf of Mexico from the waters flowing into the Gulf of California, to the place of beginning, as set forth in the map drawn by Charles Preuss, and published by the order of the United States in 1848."¹

On the 5th of July, Almon Babbitt was elected delegate to Congress and three days later a memorial asking for admission into the Union as a state was adopted by both houses of the Legislature.² On the 6th of September, by order of President Taylor, General John Wilson, United States Indian agent, held a consultation with Brigham Young, Heber Kimball, Willard Richards, and other Mormons to see if some arrangements could be made for temporarily uniting the whole of the California territory under one government for the purpose of keeping the slavery question out of Congress.³ At the beginning of 1851 the union was to be dis-

¹ *Journals of California Legislature*, 1850, 1st sess., 443-444.

² Bancroft, *History of Utah*, 444.

³ For an account of this conversation see Young's letter given above, p. 153, note.

solved and Deseret and California were to become separate states.¹ As a result of the conference ² John Wilson and Amasa Lyman were sent as delegates to California. On the 8th of January, 1850, they addressed a communication from San Francisco to Governor Burnett in which they informed him that they had been appointed by the people of the Great Salt Lake valley and basin, as representatives to any convention which might assemble in California, west of the Sierra Nevada, to form a constitution.³ "Our constituents will regret to learn that before their delegates did or could arrive here, the Convention had met, concluded their labors, and adjourned, thereby closing all opportunity, for the time, for their delegates to enter upon the discharge of their duty." They were communicating with the Governor, they said, and through him with the Legislature, to see if arrangements could be made for calling another convention in which the delegates of Eastern California might be admitted. The purpose of the second convention would be to form, for the present, a single state out of the territory of California, and at the same time to agree on boundary lines which should ultimately separate California and Deseret, when the latter had sufficient population to form a separate state.⁴

The people of Deseret, they continued, would insist on the "summit of the Sierra Nevada as a proper and natural

¹ Bancroft, *History of Utah*, 446.

² *Ibid.*

³ *Journals of the California Legislature*, 1850, 1st sess., 436.

⁴ *Ibid.*, 440.

boundary" as far as it went. Some complaint had been made because, by extending their boundary to the Pacific, a large area of country had been included within the limits of Deseret without the consent of the people living in that territory. Deseret was willing to leave this to a vote of the people inhabiting the territory in question. If they should object to coming into the state of Deseret, then a compromise line, excluding those settlements, could be drawn. Deseret especially desired that the boundaries agreed upon should be clearly indicated in the constitution. Upon these terms, and with a most earnest desire to settle all excitement in the Union, and to harmonize the interests of the people on both sides of the Sierra Nevada, Deseret's representatives proposed to the Legislature of California to ask the people to assemble in their election districts and vote for delegates to a new convention. They also added that in case the convention was called they would cast their vote against slavery.¹

The Governor transmitted this communication to the Senate and Assembly the following February, accompanied by a message to both Houses strongly recommending the rejection of the proposal.² As a result, the Legislature took no action in the matter. This ended the attempt to establish common boundaries for the two states.

¹ *Journals of the California Legislature*, 1850, 1st sess., 441.

² *Ibid.*, 429-435, and Bancroft, *History of Utah*, 446-447.

Non-sectional Character of the Contest

During the discussion of the boundary question, McDougal, referring to the Gwin-Halleck proposal, said he knew it would not be accepted by Congress. If it were not accepted, another convention would have to be called and other lines adopted. In the meantime California would remain in its present chaotic condition. This, he thought, was exactly what the supporters of that proposition wanted. "They want a constitution presented to Congress so objectionable that it will be thrown back for another convention. Gentlemen have risen on this floor and stated that they had received letters from the South; and that they knew of many others who want to bring their slaves here, and work them a short period in the mines and then emancipate them. If this constitution is thrown back on us for reconsideration, it leaves them the opportunity of bringing their slaves here. It is what they desire to do; to create some strongly objectionable feature in the constitution in order that they may bring their slaves here and work them three months." ¹

More than two weeks later Jones replied. If McDougal's charge were true, he said, how was it that the extreme eastern boundary was "supported by the North as well as by the South? The argument is not worthy of consideration." ²

¹ Browne, *Debates*, 180. When McDougal made his speech he had a proposal before the House, the first clause of which included more territory than the Gwin-Halleck proposition, and later he submitted a second which also provided more extensive boundaries. See Browne, *Debates*, 168 and 437.

² *Ibid.*, 442.

Was Jones right or was McDougal's charge true? The latter has been the generally accepted view.¹

Royce, in his *California* (1886), says the men from southern states formed a separate party under the leadership of Gwin. "Their undoubted object was not so much to give over any part of California at once to slavery, since this hurrying life of the gold-seekers wholly forbade any present consideration of such a plan, but to prepare the way for a future overthrow of the now paramount Northern influence in the territory, and so to make possible an ultimate division of the state, in case the southern part should prove adapted to slave labor."²

A similar opinion is expressed by Bancroft. Giving what he considers to be the views of southern men in the Convention he says, "Let Northern California be a free state; out of the remainder of the territory acquired from Mexico half a dozen slave states might be made."³ A little further on he quotes from McDougal's speech,⁴ the part given above,

¹ Taylor's *Eldorado* was published in 1850, the year after the Convention was held. He was present during the discussion of the boundary question, and devotes considerable space to it, but there is no indication of a struggle between the Old North and the Old South in the controversy as he gives it. Tuthill says, "There is no doubt that the most comprehensive boundaries were advocated with the hope that the action of the Convention would be taken as final, and relieve the administration" of the slavery question (*History of California*, 274), but he makes no comment on the aim of southern men in the controversy. Hittell, in his brief account of the subject, expresses no opinion as to the aims of those men favoring the extreme eastern boundary. (*History of California*, II, 766-767.)

² Royce, *California*, 262.

³ Bancroft, *History of California*, VI, 291.

⁴ *Ibid.*, 293-294.

and says that what it "lacked in grammar and rhetoric it supplied in facts." ¹

In 1890, the *Century Magazine* requested Francis Lippitt, who had been a member of the Convention, to contribute any new information he could on the organization of the state government in California. He wrote an article for the September number on *The California Boundary Question of 1849*. He was informed after the Convention, he said, that the extreme eastern boundary had been supported by men "from the southern states with the view to a subsequent division of California by an east and west line into two large states, each having its share of the Pacific coast; and further, to the future organization of the southern of these two states as a slave state—an event that would be quite certain, in as much as most of the settlers in that part of California had come and would continue to come from the South and Southwest. Thus the new free state would be offset by a new slave state."

An article in the *Overland Monthly* for the same month and year, on the *Beginnings of California*, by F. I. Vassault, contains the following: "The fact behind this animated dispute about the location of the eastern boundary was that the pro-slavery members of the Convention hoped that by making the state so large as to include the whole of the Mexican cession it would be necessary later to divide the state, and a line running east and west might give one state to the South and the other to the North. Extreme bitter-

¹ Bancroft, *History of California*, VI, 295.

ness was shown during the discussion, for the slavery element was fighting in the last ditch."

Dr. Rockwell D. Hunt, in *The Genesis of California's First Constitution*,¹ says, "The design was to make a state so large that division would be necessary," and the southern part would come in later as a slave state. "It is not surprising . . . that friends of slavery fought with utmost vigor for such vast territory as would necessitate division."

There was published at San Francisco in 1901, however, a little volume entitled *The Transition Period of California*, by Dr. Samuel H. Willey, which gives a different view. Dr. Willey lived at Monterey during the eventful year of 1849, was personally interested in the formation of a state government, and was Chaplain of the Convention during its entire session. On page 104 of his work occurs the following: "Just here may be as good a place as any to say that nothing whatever was said in the debate indicating that there was an expectation or purpose on the part of the southern members that the adoption of the larger boundary would result in the introduction of slavery into any part of the territory. Nor was there any appearance, in or out of the Convention, of any secret understanding on the part of any upon the subject. Most of the men who advocated the larger boundary were thorough and pronounced northern men."

An examination of the positions of northern and southern men in the Convention as indicated by the leading speakers

¹ *Johns Hopkins University Studies*, Vol. XIII.

and especially by the actual votes cast will show that the last writer quoted was correct.

The extreme eastern limit over which the discussion took place was that indicated in the Gwin-Halleck proposition,¹ proposing practically the 112th degree of west longitude as the boundary. The leading speakers for and against that boundary have been given, together with their arguments. We have seen that Gwin, Halleck, Sherwood, and Norton were the principal supporters of the proposal on the floor of the House. Among these Gwin was the only southern man; the other three were from the North. Norton was born in Vermont and emigrated to California from New York. Halleck and Sherwood—the former the author of the proviso clause in the Gwin-Halleck proposal and a strenuous supporter of the extreme eastern boundary—were both born and raised in New York. Of the seven supporters of the small state who have been quoted above, Price, Shannon, McDougal, and Lippitt were from the northern states, while Semple,² McCarver, and Botts were from the South. No man in the Convention more earnestly urged the narrow boundary than Botts.

The usual supposition has been that the extreme eastern boundary was supported by pro-slavery men for the purpose of making California so large that a subsequent division,

¹ McDougal's proposal did not receive consideration.

² Semple, the president of the Convention, did not speak very often on the subject. The speech made by him quoting King might lead one to think he favored the extreme boundary, but an examination of the votes cast will show that he favored the more contracted limits on every occasion.

by an east and west line, would result in the establishment of two large states on the Pacific, one to be dedicated to freedom and the other to slavery.¹ This view, however, is not substantiated by facts. On six different occasions members of the Convention expressed fear that such a division might occur. The first was by the committee on the boundary, which was made up of one northern man, two foreigners and two natives.² The second expression of fear of such division was by McCarver, a native of Kentucky;³ the third by Semple, also a native of that state;⁴ the fourth by Snyder of Pennsylvania,⁵ the fifth by Sherwood of New York,⁶ and the last by Gwin.⁷ The last named has usually been considered the arch-villain in the southern plot. Thus three southerners, three northerners, two foreigners, and two native delegates clearly expressed a fear of such an event.

But the votes taken on the different proposals show even more clearly that there was no attempt on the part of delegates from southern states to unite against members from the North for the purpose of forcing the extreme eastern boundary on the House. There were nine votes taken on

¹ Bancroft, *History of California*, VI, 291 and 294-5; Royce, *California*, 264-66; Hunt, *Genesis of California's First Constitution*, 49; Coman, *Economic Beginnings of the Far West*, II, 248. The last named author also implies that the native delegates were assisting southern men in bringing about such a result.

² Browne, *Debates*, 123.

³ *Ibid.*, 170.

⁴ *Ibid.*, 176.

⁵ *Ibid.*, 182-83.

⁶ *Ibid.*, 182 and 184.

⁷ *Ibid.*, 445.

proposed boundaries in which the names of the voters are recorded. In the case of the first, the Gwin-Halleck proposal, we know that it was adopted by nineteen to four, but we have no way of determining the influence of North and South in that particular case.¹ The substitute offered for that proposal when the subject came up for reconsideration two weeks later, was presented by Hastings. This suggested the 118th degree of west longitude as the eastern limit. Of the twenty-three votes cast in favor of the proposal, fourteen were from northern, eight from southern states, and one from Switzerland.² Twenty-one votes were registered against the measure, of which nine were northern, seven were native, and five from southern states.³ On the following day a motion was made to reconsider the boundary question and Hastings' proposal was again before the House. Of the seventeen votes cast in its favor on this occasion, eight were by southern men (the same who had supported it on the preceding day), eight by northern men and one was by a foreigner. Twenty-seven votes were registered against it, of which fourteen were cast by men from northern states, eight by native delegates and five by men from the South.⁴

Shannon's proposal recommending a boundary very much like the one finally adopted was the next to come before the Convention. Nineteen votes were registered in its favor.

¹ Browne, *Debates*, 200.

² *Ibid.*, 418.

³ *Ibid.*

⁴ *Ibid.*, 431.

Eleven of these were cast by men from northern states, seven by men from the South, and one by a man (Sutter) from a foreign country. Of the eight southern delegates who voted for the narrow boundary formerly, all but one, Hoppe, voted for Shannon's proposition, and Hoppe evidently was not present, as his vote is not recorded. Of the twenty-five registered against it, thirteen were cast by men from northern states, eight by native delegates, and four by men from the South.¹

McDougal withdrew the first clause of his proposal, thus leaving it very similar to Shannon's—the 120th degree of west longitude.² Thirteen of the twenty-two votes cast in favor of the proposal were by men from northern states, eight by men from southern, and one by a man from a foreign country. Eleven men from northern states, eight native delegates, and five men from the South—twenty-four in all—voted against it.³

Another vote was then taken on the boundary drawn up by Gwin and Halleck, and it was adopted for the second time. Twenty-four votes were cast in favor of it. Eleven northerners, eight natives, and five southerners voted for the measure; thirteen northerners, eight southerners, and one foreigner voted against it.⁴ A vote was then taken on Jones's proposal, which it will be remembered contained two parts—the first recommending the 120th degree of

¹ Browne, *Debates*, 443.

² *Ibid.*, 440.

³ *Ibid.*

⁴ *Ibid.*, 440-441.

west longitude, and the second, if Congress would not accept that, offering the 112th degree as the eastern boundary. There were thirteen votes for the proposition and thirty-one against it. Among the former, eight were cast by northern and five by southern men; among the latter, sixteen were cast by northerners, seven by natives, seven by southerners and one by a foreigner.¹ Hill's proposal, making the 115th degree of west longitude the eastern limit, received twenty-four votes in its favor and twenty-two against it. Of the former, ten were cast by northerners, nine by southerners, four by natives, and one by a foreigner. Against it were fifteen northerners, four southerners, and three natives.²

One more attempt was made to have the Gwin-Halleck, or extreme eastern boundary adopted, but it was rejected. Of the eighteen votes in favor of it, eight were cast by northern men, six by natives, and four by southerners. Fourteen northerners, eight southerners, one native, and one foreigner opposed the measure.

The final vote was then taken on the first clause of Jones's proposal, recommending the boundary as it was finally established. It was adopted by thirty-two to seven. Eighteen northerners, ten southerners, three natives, and one foreigner voted for it. Three northerners, two southerners, and two natives voted against it.³

It will thus be seen that in every vote cast the majority of the southern delegates favored the smaller boundary.

¹ Browne, *Debates*, 456.

² *Ibid.*, 457.

³ *Ibid.*, 458.

In the first case—the Hastings proposal, offering the 118th degree of west longitude—eight voted for, and five against it. The same proposal when it came up the next day received the vote of the eight southern delegates who had formerly supported it, and was opposed by the same southerners, five, who had formerly voted against it. Shannon's proposal was supported by seven southerners and was opposed by four from that section. Practically the same eastern boundary—the 120th degree of west longitude—offered by McDougal was supported by eight southerners, while five from the South rejected it. The second vote on the Gwin-Halleck proposal had resulted in five for and eight against it. Five were cast for and seven against the double proposal offered by Jones. Up to this point the five southern delegates who had stood out for the extreme eastern boundary were Gwin, Hobson, Hollingsworth, Jones and Moore. Moore did not vote on Shannon's proposition. Jones's proposal, however, was rejected by Gwin. Hoppe, a southern delegate who had voted for the more contracted boundary, supported the proposition. Hill's proposal—the 115th degree of west longitude—was supported by nine southern delegates and rejected by four. Gwin voted against it and Jones for it. In the third vote on the Gwin-Halleck proposition four southerners were for it and eight against it. The first clause of Jones's proposal was supported by ten southern votes. The two southerners who voted against it were Hill and Hobson. Hill had formerly voted for the contracted boundary; Hobson, however, had consistently opposed it.

This evidence seems to show conclusively that the debate

and the votes had no sectional character. The majority of the delegates who had immigrated to California from southern states were not only not fighting to have the Convention adopt boundaries so extensive that the constitution would be rejected by Congress, but they were actually contending against that very thing. Every time they had a chance to express themselves by their votes—with the possible but not probable exception of the first vote taken on the Gwin-Halleck proposal, where the names of the voters were not given—the majority of them opposed the extreme eastern boundary. Even when Jones submitted his double proposition making the 112th degree of west longitude a proviso clause to be considered by Congress only in case that body should absolutely refuse to accept the new state with contracted limits, the majority of the delegates from southern states voted against it. And the motive which seems to have actuated them, as the rest, was a desire to obtain immediate admission to statehood.

CHAPTER VIII

CORPORATIONS AND BANKS

THE panic of 1837 had such a pronounced effect on the construction and revision of the fundamental laws of the states in so far as they controlled the incorporation of associations, especially those with banking privileges, that it will be well to consider very briefly the panic itself and its influence on the making of state constitutions in general before dealing more fully with the discussion of the subject in the California Convention of 1849.

Financial Disorder in the Late Thirties

On September 26, 1833, Taney, Secretary of the Treasury, issued an order directing that the money of the United States should henceforth be deposited in certain state banks selected for the purpose. The amount on deposit in the United States bank was soon exhausted through drafts for the ordinary expenditures of the government, and by 1836 it had ceased to be a fiscal institution of national importance.¹ In January, 1835, the national debt was paid,² and the next year the usual income of the government from taxation, custom duties, etc., was increased by \$24,877,179 from

¹ Dewey, *Financial History of the United States*, 206-208.

² *Ibid.*, 219.

the sale of public lands.¹ To procure additional places for storing the nation's currency, the number of "pet banks" was increased. On January 1, 1835, the government had \$10,323,000 distributed among twenty-nine banks. By November 1, 1836, eighty-nine banks held \$49,378,000 of government moneys.² The selection of state banks as places of deposit for the national funds proved a strong incentive to bank building, and the passage of a bill in June, 1836, making the states the depositories of the surplus added an increasing number of such institutions to those already in existence. In 1834 there were five hundred and six banks in the United States. This number had increased from seven hundred and four in 1835 to seven hundred and thirteen and seven hundred and eighty-eight in 1836 and 1837 respectively.³ During the last named year occurred a national panic which brought ruin to hundreds and thousands of people, but the wealth of paper issued for money seems to have encouraged still further the development of banks. By 1838 there were eight hundred and twenty-nine, and the number increased to eight hundred and forty in 1839 and to nine hundred and one in 1840.⁴ The destruction of the national bank removed the only agency for preserving a sound currency,⁵ and the small banks throughout the country issued paper without much regard to the amount of specie on hand with which to redeem it. During the summer

¹ Dewey, *Financial History of the United States*, 217.

² *Ibid.*, 210.

³ *Ibid.*, 225.

⁴ *Ibid.*

⁵ Catterall, *The Second Bank of the United States*, 430.

of 1837, specie payments were suspended in all the banks throughout the country. In New York the legislature legalized suspension for a year, and other state legislatures soon passed similar enactments. There were in circulation not only United States and state notes, but paper issued by private banks and even by private individuals. The national government paid its creditors in the paper of suspended banks.¹

Effect on State Constitutions

Such a financial chaos necessarily had its effects on the making of state constitutions. Between 1838 and the year in which California began the organization of her state government, four new states drew up constitutions for admission into the Union, and six of the older states adopted new ones. Of the former group were Florida in 1838, Texas in 1845, Iowa in 1846, and Wisconsin in 1848; of the latter were Pennsylvania, Rhode Island, New Jersey, Louisiana, New York, and Illinois in 1838, 1842, 1844, 1845, 1846, and 1848 respectively.² In all of these, except Rhode Island, rigid measures were inserted limiting the power of the legislatures to create banks or associations of any kind for banking purposes. The provisions restricting banking privileges in the constitutions of New York and Iowa were taken as

¹ Schouler, *History of the United States*, IV, 279-80.

² Poore, *Charters and Constitutions*. For the Iowa constitution of 1846 see Parker, *Iowa as it is in 1855*, 206-233. Poore does not give this, but has reprinted the constitution of 1857 by mistake.

examples by delegates in California for the formation of similar provisions in the constitution of 1849. We shall have a chance to compare these presently.

The California Attitude—Majority and Minority Report

Many of the delegates who took part in drawing up the California constitution of 1849 knew of the effect of the panic of 1837 on the revision and formation of state constitutions. It is not surprising, therefore, that they were strongly opposed to permitting the organization of corporations or associations of any kind with banking privileges. Gwin, one of the older members, recalled conditions in the United States between 1836 and 1840, when "the country was flooded with post notes, corporation and individual tickets, and, in many instances, certificates of deposit," and warned his colleagues against creating possibilities for similar occurrences in California. "It would be a curious spectacle," he asserted, "to exhibit before this Convention the various kinds of paper in circulation, as money, during that memorable period." He claimed to have seen collected as a matter of curiosity about one hundred different kinds, and if he had them there, he thought they would be the strongest arguments he could produce against the organization of banking establishments in any form.¹

On the other hand there were some who, while feeling that it would be unnecessary to organize banks in California, considered it essential to provide for the establishment of

¹ Browne, *Debates*, 117.

associations where gold and silver might be deposited. It would also be wise, Sherwood thought, to permit such corporations to issue certificates of deposit. With the large amount of precious metals found in California, some place of deposit was absolutely necessary, and it would be much better for the Legislature to provide for the establishment of reliable public associations, to be formed under general laws, than to have the people depend on "irresponsible private establishments." ¹

These views held by Gwin and Sherwood reflect, in a general way, the different opinions of members of the Committee on the Constitution, and resulted in a majority and minority report from that body on the subject of corporations and banks. Generally speaking, the minority wanted to adopt restrictions similar to those given in the constitution of Iowa, while the majority favored the more liberal provisions of the New York constitution of 1846. The majority report offered by Norton, the chairman of the Committee on the Constitution, proposed the following, taken almost verbatim from the first four sections of article eight of the constitution of New York, as the thirty-first, thirty-second, thirty-third, and thirty-fourth sections of the article on the legislative department:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporation cannot be attained under general laws. All general laws and special acts passed pur-

¹ Browne, *Debates*, 119.

suant to this section may be altered from time to time, or repealed.¹

"Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

"The term corporation, as used in this article, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships; and all corporations shall have the right to sue and shall be subject to be sued, in all courts in like cases as natural persons.

"The Legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed under general laws for the deposit of gold and silver."²

The minority report, read by Gwin, was composed of two sections (taken almost bodily from the constitution of Iowa for 1846) as follows:

"No corporate body shall be created, renewed, or extended, with the privileges of making, issuing or putting in circulation, any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money. The Legislature of this state shall prohibit by law, any person or persons, associations, company or corporation from exercising the privileges of banking, or creating paper to circulate as money.

¹ Browne, *Debates*, 108.

² Poore, *Charters and Constitutions*, Part I. Also Bishop and Attree, *New York Convention of 1846*.

"Corporations shall not be created in this state by special laws, except for political or municipal purposes, but the Legislature shall provide, by general laws, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders of every corporation or joint stock association, shall be personally and jointly responsible for all its debts and liabilities of every kind. The state shall not, directly or indirectly, become a stockholder in any corporation. All general laws and special acts passed pursuant to this section, may be altered from time to time or repealed; and all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."¹

Jones had formerly proposed the second section of the "eighth article" of the constitution of Iowa, with an amendment thereto, as a substitute for the majority report, but withdrew it to permit Gwin to offer the two sections given above.² He later submitted the following, which he claimed to be the same proposal taken from the same source. The section was taken word for word from the Iowa constitution of 1846, but the amendment to the same was omitted. It is as follows:

"Corporations shall not be created in this state by special laws, except for political and municipal purposes; but the General Assembly shall provide, by general laws, for the organization of all other corporations except corporations

¹ Browne, *Debates*, 115. Compare with article VIII in the constitution of Iowa, 1846. Parker, *Iowa as it is in 1855*, 225.

² Browne, *Debates*, 108.

with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The state shall not, directly or indirectly, become a stockholder in any corporation." ¹

The discussion which followed as to the order of amendments induced Jones to withdraw his proposal for the second and last time, but he continued to support the cause of the minority.

Were the Majority and Minority Reports Alike?

Hastings objected to the minority report because it was too verbose. In section thirty-four of the majority report, he said, the Committee had positively prohibited banking in a sentence which would not exceed a line and a half in print. In the minority report there were six or more lines all amounting to the same thing.² Corporations of all kinds were prohibited by special law according to the minority report, said Norton, chairman of the Committee, and banking and the circulation of paper as money were also forbidden. But those same things were prohibited by the Committee. Practically the only difference between the two was in regard to the liability of corporations. So far as that particular point was concerned, he was perfectly willing to have the wording of the Committee's report changed so that

¹ Browne, *Debates*, 112. Compare with article VIII, section 2 of the constitution of Iowa.

² Browne, *Debates*, 114.

individual members could be held more rigidly responsible for the liabilities of such associations. The Committee had consulted different state constitutions and had selected such provisions as they considered necessary for the purpose of preventing the Legislature from granting charters to banking associations, and prohibiting all corporations from issuing paper money.¹

Jones did not believe that they had succeeded in doing it. There was "not a single article where the difference between the majority and minority reports was not distinct and positive." The last clause in the first section of the minority report obliged the Legislature of the state "to prohibit by law, any person or persons, association, company, or corporation, from exercising the privileges of banking, or creating paper to circulate as money." This was positive and unconditional. Compare it with the last clause of the thirty-fourth section of the majority report: "but associations may be formed under general laws for the deposit of gold and silver." If an association was organized for the purpose of receiving gold and silver under that clause, would it not have authority to issue certificates payable to bearer? He thought that if they could enter into any speculation, "and take the money deposited in their hands and use it for the purpose of trade, and issue certificates of deposit, probably at par," it would be for all practical purposes "a bank, and the worst sort of bank." "Where is their stock? What are the individual speculators liable for? You bind them by a bond? What is a bond? Cannot any lawyer pick a flaw in a

¹ Browne, *Debates*, 109.

bond? Give me private and individual responsibility. The whole system is different from the minority report.”¹

Gwin thought that the state of California would undoubtedly be saddled with a banking system if the Convention adopted the majority report as it stood. It was true that the words “bank” and “corporation” did not appear in the report; their insertion might alarm the people. “Association” was the “magic word” which was to remove all objections. The Legislature was to be the sole judge of the necessity of passing special acts for creating corporations. Such constitutional restrictions (he was referring to the first sentence in the thirty-first section of the majority report) would be absolutely worthless. The minority report was perfectly clear on the subject: the report of the majority left dangerous openings.²

Gwin Charges Majority with Attempts to Force Banks on the State

In fact, Gwin said, the Committee intended to leave these dangerous loop-holes. They did it so that the Legislature could inflict banks and banking corporations on the people. The whole bill was “cunningly devised” for that very purpose. The Committee spoke out boldly enough when placing restrictions on banking, “but when they wish to steal from the people the nucleus around which a monied oligarchy may be built up in the country, the subject is approached—

¹ Browne, *Debates*, 114-115.

² *Ibid.*, 115-118.

let me say with all due respect to the Committee, whose motives I in no wise impugn—in real petit larceny style; aye, with the cringing sycophancy of the beggar asking alms while filching your purse from your pocket.” It was a carefully arranged scheme, and drawn up in imitation of the sections in the New York constitution.

The New York constitution, he said, was undoubtedly all right for New York, but it would never do for California. There was no similarity in the conditions in the two states. In New York corporations were institutions of ages, and had become an indivisible part of the system of government. It could not be expected, therefore, that the sections in the constitution of that state affecting corporations would be suited to a new country. They had been drawn up rather to restrict and restrain what had existed for half a century. Did gentlemen imagine they would find the same provisions in that constitution if New York, in 1846, had been in a similar position to California in 1849? The people in the latter state were a new people, creating from chaos a government. “Our country is like a blank sheet of paper, upon which we are required to write a system of fundamental laws. Let the rights of the people be guarded in every line we write, or they will apply the sponge to our work.”¹

Sherwood, a member of the Committee, said that the accusations made against that body were without any foundation whatever. They had made no attempt to keep the word “bank” from appearing in the constitution. On the other hand they had been actuated by an earnest desire to

¹ Gwin, *Memoirs*, 20 *et seq.* Also Browne, *Debates*, 115–118.

draw up a constitution which would meet the approval of the people—a constitution which would deprive the Legislature of all power to create banking associations.

It was true, he said, that the Committee had followed the New York plan, but they did it after consulting various constitutions and because they believed the provisions governing corporations and banks in that constitution were more adequate to the needs of California than those of any other which they had examined. The convention that drew up that document had been elected by the people in 1846 for the purpose of restricting the Legislature in its power of creating corporations. This resulted in the powers of that body being strictly confined to the passage of general laws of incorporation. Corporations could not be created by special acts, except for municipal purposes, and even then only in those cases where the object could not be attained by general laws. The Committee had made similar careful provisions in their report. They had defined corporations, they had forbidden the creation of banks, they had declared that the Legislature should create no institutions which should issue bank bills of any description. What more could the gentlemen want?

As a matter of fact, however, Sherwood declared that he did not oppose a well regulated banking system such as had been established in New York. He agreed with other members of the Convention that such institutions were not needed in California. But some reliable place of deposit was absolutely necessary, and such institutions must be permitted to issue certificates of deposit. The gentleman

(Gwin) knew that if he desired to send money to Louisiana, for instance, he must either buy a bill of exchange or get a certificate of deposit. If he secured the latter he would want to know that the association which issued it was a safe institution. The report of the majority committee provided for the creation, by the Legislature, of associations for the deposit of gold and silver. They were to be established under general laws, not by special acts. They were to be created for the protection of depositors, not as irresponsible speculating corporations organized by the Legislature for a few of its favorites. They were to be allowed to issue receipts for deposits, but they were forbidden to issue bank bills of any kind. Certainly the gentleman would not prevent an individual or an association from issuing certificates of deposit.¹

Fear of Paper Money

Price would. If associations were permitted by the Legislature to issue certificates of deposit, some of the ingenious lawyers in the state might contrive schemes whereby such certificates would be allowed to circulate as money. He was unwilling to take any chances. There was no subject that could come up on which he would feel so strongly as on this, and there was nothing else he dreaded half so much as the "monster serpent, paper money." He thought the majority report contained some dangerous openings; at least it did not emphatically and unconditionally reject banking cor-

¹ Browne, *Debates*, 118-119.

porations under whatever disguise they might appear. "Let us say what we mean, that corporations shall never be chartered by the Legislature with banking privileges, such as receiving or holding gold or silver on deposit." He favored the broad doctrine of free trade and free banking as being more applicable to conditions in California than any other.¹

On the other hand Botts declared that the very best way to prevent the establishment of a bank was to secure the existence of a circulating medium of paper money. He had been studying the subject ever since the panic of 1837, and he had concluded that every mercantile community demanded a more portable circulating medium than gold and silver. "You may make all the provisions in the world that you choose; but if you leave a loop-hole, this insinuating serpent, a circulating bank, will find its way through, because of the absolute necessity of the community for a paper currency." How then was the object to be effected? Botts answered the question in a paper which he read before the Convention, the substance of which was that the treasurer of the state should open a place of deposit for gold and silver, and should issue certificates "of suitable denominations, dollar for dollar on the amount deposited, payable on demand," which were to circulate as money. The certificates were thus to be secured by deposits with the treasurer, and the state was to be held responsible for them. The subject of the currency he considered of too much importance to be trusted in the hands of the community. It was especially a subject for legislation, and required the protection of the

¹ Browne, *Debates*, 113-114.

government. If some such arrangements as he suggested were not adopted he was afraid the country would be flooded with individual tickets and notes or paper issued by irresponsible corporations. The latter would be the result under the clause "but associations may be formed under general laws for the deposit of gold and silver," if the Convention adopted the majority report; the former might happen if the minority report were accepted and the entire banking system thrown into the hands of private individuals.¹

The plan proposed by Botts, however, never received serious consideration. Early in the discussion, Halleck and Semple, the former a member of the Committee, declared that they could see no reason for adopting the minority report when the same object could be attained by amending the report of the majority. If the House wished to place further limitations on the Legislature, as suggested by the report of the minority, why not do it by permitting the question to come under the proper section of the Committee's report. For instance, the section prohibiting the circulation of bank notes in the latter could be amended to include also tickets, checks, bills, promissory notes and other papers. Other sections could be similarly changed. They could see no reason for rejecting the report of the majority and adopting that of the minority when all objections could be removed by slightly altering the former.²

This suggestion was finally adopted and the majority report, with an omission and an addition, together with a

¹ Browne, *Debates*, 124-126.

² *Ibid.*, 111-112.

slight change in the wording of two sections, was accepted as part of Article IV as follows:

“31. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed.

“32. Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law.

“33. The term corporations, as used in this article, shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases as natural persons.

“34. The Legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed under general laws for the deposit of gold and silver. But no such association shall make, issue, or put in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money.

“35. The Legislature of this state shall prohibit, by law, any person or persons, association, company, or corporation, from exercising the privileges of banking, or creating paper to circulate as money.

“36. Each stockholder of a corporation, or joint-stock

association, shall be individually and personally liable for his portion of all debts and liabilities.”¹

By comparing the report of the majority with the sections as adopted, it will be seen that the following clause was omitted from the former: “and in cases where, in the judgment of the Legislature, the objects of the corporations cannot be attained under general laws.” As pointed out in the discussions, this clause, had it been retained, would have left the whole subject of creating corporations by special acts, in the hands of the Legislature. Norton, who spoke for the Committee, had asserted that corporations created by special acts when the object for which they were created might have been attained under general laws, would be unconstitutional, and that the question of their constitutionality would be for the courts to determine. Lippitt pointed out that by the very wording of the clause the question of constitutionality was left to the judgment of the Legislature.²

The thirty-second and thirty-third sections were adopted as they came from the hands of the Committee on the Constitution. The thirty-fourth section was also accepted, with the addition of the following sentence: “But no such association shall make, issue or put in circulation, any bill, check, ticket, certificate, promissory note or other paper, or the paper of any bank, to circulate as money.” In other words, while the Convention finally agreed to permit a constitutional provision for the organization of associations, under general laws, for the deposit of gold and silver, they were determined

¹ Browne, *Debates*, 129, 135, 136.

² *Ibid.*, 109.

that no such association should be allowed to issue paper of any kind which could circulate as money.

The thirty-fifth section, as proposed by the Committee, was as follows: "The Legislature shall have no power to pass any law sanctioning, in any manner, directly or indirectly, the issuing of bank notes of any description." This was struck out for the purpose of adopting the thirty-fifth section given above. The thirty-sixth, "The stockholders of every corporation or joint-stock association shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association for all its debts and liabilities of every kind," was also omitted, and the last section given above substituted for it. In the thirty-fifth section, instead of saying, as the Committee proposed, that the state Legislature should have no power to pass any law sanctioning the issue of bank notes, the Convention substituted a more rigid sentence requiring the Legislature to prohibit by law the creation of banks or paper money. The thirty-sixth as adopted puts in fewer words and expresses in a clearer form the idea contained in the section proposed by the Committee.

Thus the wide spread fear of corporations, banks and paper money which extended over the country as a result of the panic of 1837, manifested itself in California also, and the delegates to the Convention of 1849 placed rigid constitutional restrictions over the organization of the first, and declared themselves firmly against permitting the last two in any form whatever.

CHAPTER IX

EDUCATION AND TAXATION

IN this chapter education and taxation will be considered under the following heads: (1) educational provisions in general, with special reference to the section establishing a school fund, (2) land grants made by Congress for educational purposes, (3) grants made by that body for internal improvements which were diverted by the constitution to the support of schools, (4) the connection between the subject of education and that of taxation, and (5) the discussion of the section on taxation.

Article on Education

The article on education as reported by the Committee on the Constitution contained five sections. The first of these, which was adopted without debate, provided for the election of a superintendent of public instruction who should hold office for three years.¹ The second, with arguments for and against it, is given below. The third required the Legislature to maintain a school in each school district at least three months in every year. An attempt was made to change the term to six months instead of three, but this failed and the third section as reported by the Committee

¹ Browne, *Debates*, 202.

was adopted.¹ Section four provided for using for educational purposes or for the establishment of libraries the "clear proceeds of all fines collected in the several counties, for any breach of penal laws," the funds thus raised to be divided among the school districts of the counties in proportion to the number of inhabitants in each district. This section was voted down, however, because it was thought (1) that juries might be inclined to punish by fine occasionally when imprisonment should be inflicted; (2) there was a feeling against using money for educational purposes which had been taken from criminals; (3) it would be unwise to reserve solely for educational purposes a fund which might become very large and which might be needed in other departments of the government.² An attempt was then made to substitute for the fourth section another which provided for the apportioning of all funds collected in the state for educational purposes among the different school districts according to the number of school children in each. But this also failed.³ The fifth section as reported by the Committee which became section four under article nine of the constitution, was adopted without debate. It required the Legislature to take "measures for the protection, improvement, or other disposition of such lands as have been or may be granted by the United States or by any person or persons, to this state, for the use of a University; and the

¹ Browne, *Debates*, 206. Section 5 of Article IX of the constitution of 1879 requires at least six months of school in each school district every year.

² *Ibid.*, 207-209.

³ *Ibid.*, 209-210.

funds accruing from the rents or sale of such lands, or from any other source, for the purpose aforesaid, shall be and remain a permanent fund, the interest of which shall be applied to the support of said University, with such branches as the public convenience may demand for the promotion of Literature, the Arts and Sciences, as may be authorized by the term of such grant." It also required the Legislature to provide effectual means for the improvement and permanent security of all university funds.¹

The sections given above aroused little or no opposition when they came up in the committee of the whole. The second section, however, stirred up a protracted discussion, but it was finally passed as amended and still remains in the constitution of California as part of the article on education. It was reported by the Committee on the Constitution as follows:

"The Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvements. The proceeds of all lands that may be granted by the United States to this state for the support of schools which may be disposed of; and the five hundred thousand acres of land granted to the new states under an act of Congress distributing the proceeds of the public lands among the several states of the Union, approved A. D. 1841; and all estates of deceased persons who may die without leaving a will or heir; and also such per cent as may be granted by Congress on the sale of lands in this state, shall be and remain a perpetual fund, the interest of which, to-

¹ Browne, *Debates*, 210-211.

gether with all the rents of the unsold lands, and such other means as the Legislature may provide, shall be inviolably appropriated for the support of public schools throughout the state: *Provided*, That the Legislature may, if the exigencies of the state require it, appropriate to other purposes the revenue derived from the five hundred thousand acres of land granted by Congress to new states, A. D. 1841; also the rents and profits of all the unsold lands not granted by Congress for the support of education.”¹

The amended section was the above, minus the proviso clause, and it was this clause which stirred up the opposition. Before taking up the discussion, however, the significance of the section with the proviso will be better understood if we consider briefly (1) the land grants made by Congress for purely educational purposes, (2) the grants made for internal improvements which were diverted by the Convention to the cause of education.

Congressional Grants for Educational Purposes

The idea of reserving one thirty-sixth of the land within the state for educational purposes dates back to the Ordinance of 1785.² Those states entering the Union after 1850 had one-eighteenth of the land within their borders reserved for schools.³ Just how this more liberal policy originated is

¹ Browne, *Debates*, 203.

² Channing, *History of the United States*, III, 540, also Treat, *The National Land System*, 38.

³ Hart, *Practical Essays on American Government*, 245. California had more than one-seventeenth reserved for schools. See note 2, p. 23.

difficult to determine. In a report dated December 10, 1846, Walker, Secretary of the Treasury, forwarded to John Davis, the Speaker of the House of Representatives, a paper signed by James H. Piper, acting commissioner of the general land office, in which the author urged further provision for the support of common schools in the new states springing up in the West. He pointed out that the grant of one section in each township as provided by Congress in the early period of the nation's history, was inadequate for the support of schools in the sparsely settled regions of the West, and recommended that further grants be made for that purpose.¹

Just a year later Walker referred to the subject again and recommended the grant of one section in every quarter of a township. This, he said, would place a school within a mile and a half of the remotest settler, if the section granted were placed in the center of each quarter township. The recommendation was made with special reference to Oregon, and Congress adopted the suggestion to the extent of granting two sections in each township.²

In December, 1848, the Secretary of the Treasury, for the third time, called the attention of Congress to the insufficient provisions for schools, and repeated his former recommendation for meeting the difficulty. In this report he referred especially to California and New Mexico. He said the additional revenue which the government would receive by granting a section in each quarter of a township would more

¹ Bancroft, *History of California*, VI, 298, note and H. Ex. Doc., 2nd sess., 29th Cong., No. 9, 6.

² *Ibid.*

than compensate for the extra land thus granted. Each quarter of a township contained nine sections. According to his plan, the middle section would be appropriated for school purposes. But the eight remaining sections, "each adjoining a school section, would be of greater value than when separated, by many miles, from such opportunities (*i. e.*, the opportunities for schools which the grant would provide); and the thirty-two sections of one entire township, with these benefits, would bring a larger price to the government than the thirty-five sections out of thirty-six where one section only, so remote from the rest, was granted for such purposes." This, he continued, would lead to an earlier settlement of the public domain. The increasing amount of products which would result from the early settlement would produce a corresponding increase in the national wealth. The "diffusion of education" would increase the power of mind and would thus give an added knowledge to be applied to the industrial pursuits of the country, and the nation would be happier and more prosperous as a result.¹

Such were the arguments urged upon Congress by the Secretary of the Treasury in behalf of larger land grants to western states for school purposes. California doubtless owes more to these persistent recommendations than to any other one influence for her liberal grants in school lands. By an act of Congress passed March 3, 1853, sections sixteen and thirty-six in each township were set apart for the support of common schools. If these particular sections had been taken when the township was surveyed, other lands

¹ H. Ex. Doc., 2nd sess., 30th Cong., No. 7, 33-34.

might be selected in place of these by the proper state officials.¹ But these were not to be all of the lands devoted to educational purposes by the new state.

Other Grants Made by Congress

On September 4, 1841, an act was passed by Congress providing that, after deducting ten per cent of the net proceeds of the sales of the public lands within the states of Ohio, Indiana, Illinois, Alabama, Missouri, Louisiana, Arkansas, and Michigan, all the net proceeds subsequent to December 31, 1841, should be divided *pro rata* among the twenty-six states and among the territories of Wisconsin, Iowa, Florida, and the District of Columbia according to their respective federal population as ascertained by the sixth census. With the distribution were to go so-called "state-selections," to the amount of five hundred thousand acres.² The five hundred thousand acres were to be devoted to internal improvements, and were granted under the condition that to each of the said states, which had already received grants for such purposes, there should be granted only such additional amounts as would total five hundred thousand acres. The selection in all the said states was to be made within their respective limits in such manner as their legislatures should direct, and was to be "located in parcels conformably to sectional divisions and subdivisions,

¹ *Fifth Annual Report of the Superintendent of Public Instruction*, 5-6.

² Shosuke Sato, *History of the Land Question in the United States*, 154-59. In *Johns Hopkins University Studies*, Vol. IV.

of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said location may be made at any time after the lands of the United States, in said States respectively, shall have been surveyed according to existing laws." The act also provided that each new state admitted into the Union subsequent to September 4, 1841, should receive similar grants on these same terms.¹

It was under this act that the Convention expected to receive the grant of five hundred thousand acres referred to in section two of article nine as quoted above.² Section

¹ *Laws of the United States*, 27th Cong., 1842-43, ch. 16, sections 8 and 9.

² In addition to the 500,000, California received another grant by an act of March 3, 1853, already referred to. The grant amounted to 6,765,504, from which were to be deducted 46,080 acres which were to be devoted to a "Seminary of Learning" and 6,400 granted for public buildings. This would leave 6,713,024 acres (the document gives the amount as 6,712,924 acres) to be devoted to the use of common schools. Add to this the 500,000 acres devoted by the constitution to the educational fund, and the state had a sum total of 7,213,024 acres of school land out of a total area of 120,947,840 acres, or more than one-seventeenth of the area of the state devoted to the support of schools.

Of the 500,000 acres granted by the Act of 1841, 231,680 had been sold at two dollars an acre by January, 1855, so the Governor's message for January of that year reported. The unsold lands, if disposed of at one dollar and twenty-five cents an acre, would bring \$8,726,555. Counting the interest, at seven per cent on this and the funds from other lands already sold at the above date, California's annual income for the support of schools would be \$643,345.22. "Such is the princely legacy awaiting the next and succeeding generations, unsurpassed by any of the states of the confederacy, and perhaps not equalled by the endowment of any throne, principality or kingdom

nine of the act of 1841, provided that the land thus granted should not be sold for less than one dollar and twenty-five cents an acre, and that the proceeds from the sale of the lands should be devoted to internal improvements.¹ There seems to have been no doubt in the minds of the members of the Convention, however, that the income from this grant could be turned permanently into the educational fund, and section two of the article on education, as we have seen, devoted it to school purposes.

Should so Much of the State Lands be Set Aside for Education?

This brief sketch will assist the reader to understand what it meant to the new state establishing an expensive government, to strike out the proviso clause of section two. It meant the sacrifice of a large income which might have been used for governmental purposes. As already indicated the

of the old world." See Governor Bigler's *Message* in the *Senate Journal*, 1855, pp. 38-39. Also H. Ex. Doc., 1st sess., 33rd Cong., Vol. I, Part I, p. 108 for a table showing the land grants to, and the area of, the different states.

Despite this glowing report of the Governor's on the educational advantages to be bestowed on future generations of California youths, the *Fifth Annual Report of the Superintendent of Public Instruction* (1856) indicated that the existing needs were far from adequate. "We are nominally possessed of a large *School Property*," he wrote, "but practically do not receive enough to pay the salaries of three hundred and six teachers for two weeks' work in the six months of their labor, for which the small sum of \$28,269.60 was apportioned by the State board of education on the first instant (January 1st), being the entire income to the State school fund for the past half year." See p. 3.

¹ *Laws of the United States*, 27th Cong., (1842-43), ch. 16, sections 8 and 9.

proviso was struck out and the section as amended was adopted. The first vote, following a short discussion, stood eighteen to seventeen¹ in favor of the amended section, but the majority increased to twenty-six and the minority dropped to nine after a more prolonged argument following the second reading.²

Some of those favoring the omission of the proviso were extremely radical in their support of a large school fund. Even if the lands to be granted by Congress could be located in the gold regions and an income secured sufficient to educate every child in the state, McCarver thought it should be reserved for that purpose.³ Semple said it was especially important for California, with her extensive resources, to utilize every advantage which the state possessed for establishing a well-regulated system of education. To secure good teachers, a liberal and permanent school fund would be absolutely necessary. Provision should be made also for a uniform system. If any surplus fund should be collected in a district it should not be appropriated in that district, but the aggregate fund from all the districts should be appropriated strictly to school purposes and distributed equally throughout the state. The fund for educational purposes could not be too large. California might procure the services of "the President of Oxford University" if the state could offer him sufficient salary.⁴

¹ Browne, *Debates*, 206.

² *Ibid.*, 354.

³ *Ibid.*, 203.

⁴ *Ibid.*, 204. Semple's speech.

A munificent school fund would give another advantage of paramount importance to the new state. It would induce families having children to immigrate to California. The inducement would be still stronger when it was known that the fund appropriated for this purpose could not be utilized for any other. It would add greatly to the permanent settlement and prosperity of the country, and would make California one of the most desirable states in the Union in which to live. Men would come, not only to dig gold and return with it to their homes in the East, but they would bring their families with them and establish homes in California.¹

Halleck thought the principal question was whether the Legislature should be allowed to interfere with lands set apart for educational purposes. He could find no precedent for such action in any other state constitution. He thought the proviso should be rejected and that the fund should be left inviolate. After a few years the fund derived from these lands would not be needed by the state government at all, but if the proviso remained the income from this source would certainly be used. If there were any time more than another when the state needed a large fund for educational purposes, it was during this early period. Families in California were even sending their children to "the United States, or Chili, or Peru" to complete their education. The Convention should make provision for an adequate school system in order to make such action unnecessary in the future.²

¹ See Lippitt's, Gwin's, Bott's and Hoppe's speeches in Browne, *Debates*, 346-47, 384, 350 and 351.

² Browne, *Debates*, 351-352.

Furthermore, he continued, to leave the proviso as part of the second section would be to encourage the Legislature to make lavish expenditures. There would undoubtedly be difficulty in meeting the expenses of government during the first few years if the state were deprived of the use of this income for governmental purposes, but this would teach the new state a lesson in economy. "Suppose we place at the disposition of the Legislature these lands, and this fund, and also the civil fund, or what remains of it, and let us, if possible, get a further appropriation from Congress to support this government, what will be the result? Extravagance and bankruptcy. Let us lay the foundation here of an economical government; and if the new government is obliged to support itself by raising a fund out of the pockets of the people, it will be an economical government." ¹

But, the opposition replied, why burden the people with extra taxes when, by including this proviso, a sufficient fund might be realized, not only for providing adequate school facilities, but for meeting all necessary expenses of the government as well. Every member of the Convention favored the establishment of a liberal school fund. That was clearly evident. But if the five hundred thousand acres of land granted by Congress in 1841 under the "State-selection act" should be extended to California, and if those lands should be located along the rivers in the state, they might include the principal mining sections of the territory. In that case the income from this source alone might be so large that

¹ Browne, *Debates*, 351.

all of it would not be needed solely for educational purposes.¹ The Convention had been called to provide a government for men, and not merely to establish schools for children. The school fund was not particularly needed just then because there were comparatively few children in the state, and it was not probable that the number would be greatly increased for some time. On the other hand the government they were establishing would be an expensive one, and under such circumstances it was not only fair but necessary to appropriate all available funds for supporting it.² The congressional land grants should not be tied up by constitutional enactment so that the state Legislature would be unable to use them for state purposes. It was not improbable that California's first senators and representatives in Congress would be able to obtain a grant of another five hundred thousand acres of land solely for the support of schools in the state. With this and with the one or two sections in each township which Congress would appropriate for the support of schools, and which the proviso did not touch, the needs for educational purposes would be liberally met.³ If the proviso were struck out all the income from land grants, except the one or two sections in each township, would be tied up for school purposes. It had been proposed by some that the miner, who was guaranteed in his rights

¹ Browne, *Debates*, 203.

² *Ibid.*, 205-206. Jones's speech.

³ *Ibid.*, 204-205. Sherwood's speech. Later he proposed an amendment so that a two-thirds vote of the Legislature would be necessary for appropriating this fund for any other than school purposes, hoping in this way to gain over a part of the majority, but the scheme failed. *Ibid.*, 348.

by the state government, should pay a poll tax. This would be an uncertain source of revenue because the Convention could not tell just what the Legislature would do. The members of that body might impose a poll tax on miners as the entire tax or they might collect rent from a portion of the lands in the mining regions, or again they might demand a certain percentage of the amount of gold extracted. In any case, if the proviso were omitted, the entire income so collected would have to be appropriated for school purposes. The people living in the mines would therefore be contributing nothing to the support of the government. In other words, a large majority of the people within the state would be contributing nothing to support the actual expenses of providing a government for the state. The whole expense of the civil government would be thrown upon the landholders,¹ living in the southern part of the territory.

Connection Between Education and Taxation

It was doubtless this prediction made by Sherwood which led to the introduction of a constitutional provision regulating the valuation and collection of taxes. On Tuesday, September 25th, when the discussion began on reserving for educational purposes the income from all lands which Congress should grant, Sherwood intimated that such a constitutional enactment would throw the burden of taxation on the landowners living in the southern part of the state.² On

¹ Browne, *Debates*, 349 and 205. Sherwood's speech.

² *Ibid.*, 205. As already indicated, some of the members of the Con-

the following Thursday, the article on miscellaneous provisions was before the Convention for consideration. To "satisfy the opinions of southern members in regard to taxation," Halleck offered the following which was to be inserted between sections twelve and thirteen of that article: ¹

"All lands liable to taxation in this state shall be taxed in proportion to their value; and this value shall be appraised by officers elected by the qualified electors of the district, county or town in which the lands to be taxed are situated." ²

The subject received little consideration at that time, but on October 5th, the day after section two of article nine had been adopted, the above section was again brought forward. It was amended, discussed and finally adopted as amended. The amended section is given below.

Thus we have Sherwood's speech on Tuesday. On Wednesday the article on miscellaneous provisions as drawn up by the Committee on the Constitution was brought before the Convention for consideration. On Thursday, after the first twelve sections of that article had been adopted, a member of the Convention who had been active in reserving the lands granted by Congress for educational purposes, brought forward, at the suggestion of delegates from the southern

vention believed that the Legislature would locate the congressional land grants in the mining region. Outside of the Sacramento valley, which would be largely occupied with these grants, they probably thought the northern part of California would never be valuable as an agricultural center, and therefore that very little could ever be realized from a land tax in that part of the state.

¹ Browne, *Debates*, 256.

² *Ibid.*, 256 and 364.

part of the territory, a section placing in the control of each community the election of men who were to value the property and collect the taxes of each local unit. Then both subjects—education and taxation—were dropped for a week. On Thursday of the following week, October 4th, the section on education was passed by an overwhelming majority. On the morning of the next day the section on taxation was brought forward, and after a discussion which occupied the forenoon it was also adopted, but by how large a majority we do not know.¹

This suggests a close connection between section thirteen of article eleven and section two of article nine; that the constitutional enactment on taxation grew out of the constitutional provision on education. It is true that a large majority of the southern delegates who requested the section on taxation voted for the establishment of a permanent educational fund, but this does not necessarily contradict the supposition. It will be remembered that section two of article nine was adopted after the first reading by a majority of eighteen to seventeen. At the end of the discussion following the second reading it had passed by a majority of twenty-six to nine. In the former case the names of the voters are not given, so that we have no way of determining whether the southern delegates supported or rejected the section upon that occasion. It is possible, if not probable, that a majority of delegates representing southern districts had opposed the measure when the first vote was taken and finally came to its support with an understanding that

¹ Browne, *Debates*, 203-06; 239-57; 346-54; 364-76.

they would be protected from over-taxation by a constitutional provision permitting them to elect their own appraisers. The southern delegates must have realized that the school fund section would pass whether they supported it or not.¹

Section on Taxation

The section on taxation, which became section thirteen of article eleven, was amended as follows: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county and State taxes, shall be elected by the qualified electors of the district, county, or town, in which the property taxed for State, county or town purposes is situated."

Opposition to this section arose on the ground (1) that the subject of taxation should be left to the state Legislature, and (2) that the local election of town and county assessors and collectors would, if the measure were passed, offer an almost irresistible temptation to commit fraud.

Lippitt thought the Legislature, representing the whole people of the state, should be left perfectly free in the matter. Everything pertaining to taxation, the object of the tax and the rules to be adopted in collecting it, should be left in the hands of the people's representatives elected to the

¹ The final vote on the section shows a sufficient majority to have passed it even if every southern delegate who supported, had voted against it.

Legislature. Emergencies which the members of the Convention could not foresee, even the welfare, and the preservation of the state, might depend on the power of taxation.¹

The second objection to the section was summed up forcibly by Botts. He said it would practically give every man a right to fix his property at whatever rate he pleased. In the southern part of the territory a whole county might be in the hands of two or three landowners. Suppose the inhabitants of the county were dependent on these men, would it not give them an opportunity to exert an undue influence in the election of appraisers and collectors of taxes? If the interest of all sections of the state were alike, there would be no difficulty or danger in the proposal, he thought, but the delegates from the southern part of the territory had already expressed an opinion that their interests were directly opposed to those of the people living in the northern part of the country. If these local interests did exist, they should be restrained from doing injustice to others with contrary interests. "If the northern portion of the country is to be charged with a design to throw an undue burden of taxation of the state upon the southern portion, why may not, upon the very same foundation, the charge be thrown back?" As a minority of the whole people these same southern delegates had claimed permission to sit in judgment on the amount of taxes they should pay. "Why may we not aver that these gentlemen, in assessing their own lands, may avoid their proportionate burden of taxation?"²

¹ Browne, *Debates*, 365.

² *Ibid.*, 370-73.

In reply to these arguments it was urged by the other party that common justice demanded the protection of the weaker class by the stronger,—the Californians by the Americans. Any proposition which could not in itself or in its consequences work injury to the American settlers, and which was of vital importance to the native Californians, should receive the unanimous approval of the Convention. For the first few years at least, taxation under the government they were establishing would be necessarily burdensome. Under such circumstances it would be very unwise for the Convention to reject the section and place unlimited power of taxation in the hands of the Legislature, thus making it possible for that body to place an unjust proportion of the expense of government upon the native Californians who were the large landowners of the state.¹ It would not be republican to send officers from one section of the state some two or three hundred miles into another for the purpose of appraising property with which they were unacquainted. Property should be assessed by men who were familiar with it and by no others. The section before the House provided for just such an assessment of all property; it provided further that all property should be assessed according to its value. If local assessors failed to comply with that provision, the Legislature could punish such officers by penal enactment.²

As formerly stated, the amended section was finally adopted. The last part of the proposal, as one of the mem-

¹ Browne, *Debates*, 365-67, Tefft's speech.

² *Ibid.*, 369-70, Sherwood's speech.

bers pointed out,¹ was doubtless an unusual provision. The mere fact of inserting a clause in the constitution which permitted each local unit to elect its own appraisers and collectors of taxes hardly seems reasonable. Halleck declared that the constitution of Alabama contained a similar provision, but this, as Botts pointed out, was a mistake.² Its insertion in the California constitution of 1849 seems to have resulted from a chivalrous desire on the part of certain American delegates to protect native Californians, who owned most of the land in the southern part of the state, from over-taxation. When a new constitution was drawn up in 1879, this part of the section was omitted.

¹ Browne, *Debates*, 371, Botts's speech.

² *Ibid.*, 371.

CHAPTER X

THE CONVENTION'S WORK COMPLETED

A FEW other provisions must be considered briefly before dismissing this part of the subject. Among these are sections or proposed sections dealing with the following: lotteries, dueling, property of married women, state debt, right of suffrage, apportionment of representation, and the time at which the state government should go into operation. The consideration of these topics will be followed by an account of a few miscellaneous provisions and by a brief characterization of the completed constitution.

Lotteries

Should lotteries be permitted in the state? Section twenty-seven of article four as submitted by the Committee on the Constitution declared that "No lottery shall be authorized by the state, nor shall the sale of lottery tickets be allowed." ¹

Price wanted to omit the section. He was opposed to the system of lotteries as a rule, but he believed them to be necessary evils at that time. The Californians were essentially a gambling people. Every public house had its monte and faro tables, and "hundreds of men might be seen at

¹ Browne, *Debates*, 90; Tuthill, *History of California*, 276.

these houses casting their money on the chances of the game." Lotteries could not be prevented, and it would be better to legalize them than to have them operating secretly. Three thousand dollars a year could be raised by granting lottery privileges, and this would be quite an asset under the embarrassing position in which the state would be placed when the new government went into operation. To organize a perfect system of taxation at first would be very difficult indeed.¹ Shannon thought the subject should be left entirely in the hands of the Legislature; therefore he would oppose it.² And Moore said "he had received no instructions from his constituents directing him to prescribe the particular amusements at which they should pass their time; when they should go to bed or when they should get up." He came here to lay down the broad and general principles of religious freedom.³

Dimmick could not see how permitting lotteries had anything to do with establishing "broad and general principles of religious freedom," unless gambling was to be considered religious freedom. It certainly took the largest possible liberties known in any community where religion existed. Such an argument was a new theory of morals which he hoped would be omitted in the constitution of California. He thought it might be expedient to license gambling in certain parts of the country, but not lotteries. He sincerely hoped that the new state would not adopt an immoral sys-

¹ Browne, *Debates*, 90 and 91.

² *Ibid.*, 91.

³ *Ibid.*, 92; Hittell, II, 764.

tem of taxation as a source of revenue. The question of revenue he considered of trifling importance, compared with the deep and lasting injury which institutions of that kind would inflict upon the community.¹ Hoppe, Halleck and Dent also urged the Convention not to adopt, for the sake of revenue, a measure which would encourage vice and immorality throughout the state.² These arguments were effectual and the section prohibiting lotteries was adopted.³

Dueling

The second section of the article on miscellaneous provisions deprived of suffrage and of holding office all who should take part in dueling. Dent said the section should be omitted because no constitutional enactment could prevent men from fighting duels, and the proposal before the House might deprive the state of the services of some good men.⁴ Shannon wanted to omit it because it was a subject which should be left to the Legislature.⁵ Steuart thought public opinion only could prevent dueling,⁶ and Hastings objected to it because it was unconstitutional. If the section were included, said the latter, a citizen of California might be tried and punished in another state for fighting a duel there, but if he should ever return to California he would be condemned again

¹ Browne, *Debates*, 92.

² *Ibid.*, 91 and 92.

³ *Ibid.*, 93.

⁴ *Ibid.*, 246.

⁵ *Ibid.*, 247-8.

⁶ *Ibid.*, 249.

without trial by the state constitution. This would violate the clause in the United States Constitution which provided that no person, after acquittal, should be tried for the same offence again.¹

In opposition to these views, Sherwood declared the section should be included because it would establish a high standard of citizenship, and would take away a certain license for street broils and other evils which those states experienced that permitted dueling.² Gwin said that the practice had not been introduced into California, and its evil effects in those states where it existed induced him to make its introduction impossible if he could.³ Moore sarcastically remarked that it would have one advantage—it would at least afford men a pretext for not engaging in duels.⁴ Semple said that the provision, so far as he individually was concerned, was unconstitutional because his constitution forbade it. However, he was in favor of retaining the proposal if the punishment were decreased. The punishment to be inflicted according to the section as it stood, he considered more severe than the death penalty.⁵

The section was adopted practically as reported by the Committee.⁶

¹ Browne, *Debates*, 251-2.

² *Ibid.*, 246-7.

³ *Ibid.*, 248.

⁴ *Ibid.*, 250.

⁵ *Ibid.*, 253.

⁶ *Ibid.*, 255.

Separate Property for Married Women

No small degree of interest was manifested in the question of separate property for married women, and "many amusing arguments were advanced which throw a sidelight on the social status of the country."¹ The section provided that all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift or otherwise, should remain her personal property, and that laws should be passed more clearly defining the rights of the wife "in relation as well to her separate property as that held in common with her husband."² Lippitt and Botts opposed this measure because they considered it a subject which should be left to the Legislature.³ At the time of marriage, argued the former, the husband is supposed to come into possession of the wife's property, according to the common law, and is thus made responsible for her debts. Let us not experiment in this constitution, but leave the subject for the Legislature.⁴ If the section must be included, let us insert another freeing the husband from all responsibility in so far as his wife's debts are concerned.⁵

On the other hand Norton denied the "relevancy of both common and civil law,"⁶ and Dimmick pointed out that

¹ Hunt, *Genesis of California's First Constitution*, 44.

² Browne, *Debates*, 257.

³ *Ibid.*, 257 and 259.

⁴ *Ibid.*, 262; Hunt, *Genesis of California's First Constitution*, 44.

⁵ Browne, *Debates*, 262.

⁶ *Ibid.*, 265-66; Hunt, *Genesis of California's First Constitution*, 45.

the proposal simply embodied in the constitution a provision which was already recognized in the country.¹ Tefft thought that such a provision would be a safeguard, for the period of speculation upon which California was entering would make some such clause necessary to prevent the husband from squandering the wife's property.² Halleck was not "wedded either to the common law or the civil law nor, as yet, to a woman," but he advised all bachelors to vote for the section because it would be the means of inducing women of wealth to come to California.³ Whether this was the most effective argument to be offered or not, the section was finally adopted as proposed,⁴ and it is believed by one authority to be the first instance on record when "a section recognizing the wife's separate property was embodied in the fundamental law of any state."⁵

Similar sections were those prohibiting the Legislature from granting divorces and requiring it to enact a homestead law.⁶

State Debt, Suffrage, and Apportionment of Representation

The question of permitting the Legislature to create a state debt of more than \$100,000 as proposed by the Committee on the Constitution, was changed without much op-

¹ Browne, *Debates*, 262-63; Hunt, *Genesis of California's First Constitution*, 45.

² Browne, *Debates*, 258; Hunt, *Genesis of California's First Constitution*, 45.

³ Browne, *Debates*, 259.

⁴ *Ibid.*, 269.

⁵ Hunt, *Genesis of California's First Constitution*, 45.

⁶ See the *Constitution of 1849*, Article IV, section 26 and Article XI, section 15.

position to \$300,000 when the subject came before the Convention. As finally adopted the article provided that in case of war, insurrection, or an invasion of the state, or in case the appropriation were to be used for some single object or work, a larger debt might be contracted. In the latter case, however, ways and means, exclusive of loans, must be provided for paying the interest, and for discharging the principal within twenty years. Furthermore, no such law was to be effective until it had been approved by a majority of the voters at a general election.¹ Sherwood wanted to make the amount \$500,000 instead of \$100,000, while Gwin urged retaining the section as reported by the Committee on the Constitution. The compromise of \$300,000 was adopted upon the motion of Lippitt.²

The right of suffrage was extended to every white male citizen of the United States and every white male citizen of Mexico who should choose to become a citizen of the United States under the treaty of peace of 1848, of the age of twenty-four years, and who should have been a resident of the state six months next preceding the election, and thirty days in the county or district in which he claimed his vote. A proviso clause attached to the section permitted the Legislature by a two-thirds vote to admit Indians or the descendants of Indians to suffrage "in such special cases as such a proportion of the legislative body may deem just and proper." This was inserted as a concession to the native Californians.³

¹ Browne, *Debates*, 166.

² *Ibid.*, 165-66.

³ *Ibid.*, 305-08 and 341; Bancroft, *History of California*, 296-97.

The schedule which was attached to the constitution continued the existing laws in force until altered or repealed by the Legislature, and transferred to the courts created by the constitution on the admission of the state, all cases which might be pending.¹ In the fourteenth section, delegates to the Senate and Assembly of the state Legislature were apportioned as follows: to the Senate, Sacramento and San Joaquin were assigned four members each; San Francisco, two; Monterey, San José, and Sonoma, each one; San Diego and Los Angeles were jointly to elect two; and Santa Barbara and San Luis Obispo were to elect one together. In the Assembly, Sacramento and San Joaquin were to be represented by nine members each; San Francisco, by five; San José, three; Monterey, Santa Barbara and Los Angeles, each by two; and the other districts, by one member each.²

When Shall the State Government go into Operation?

At eleven o'clock on the evening of September 28th, Norton, at the request of the Committee on the Constitution, asked the Convention for instructions "as to whether the government established by this constitution shall go into operation from and after the day of its ratification by the people, or not until official news is received of the admission of California into the Union as a state." In order to get the opinion of the Convention on the subject as soon as pos-

¹ Schedule at the end of the constitution, and Bancroft, *History of California*, VI, 300-302.

² Browne, *Debates*, 400.

sible, he offered a resolution that the government should go into operation as soon as practicable after the ratification of the constitution by the people. No action was taken that night, however, and on the following morning, Friday, this resolution was the first subject to come before the Convention.¹

Botts rose immediately to attack an imaginary opposition. That there was any government in California at that time, he denied. He quoted at length from the proclamation of Governor Riley, from the messages of the President of the United States for July and December, 1848, and from the letter of the Secretary of State, Buchanan, to the people of California, to show the contradictions in the statements of those officials as to the existing form of government in the territory after the treaty of peace was signed by Mexico and the United States.² To show that Governor Riley had no right to assume charge of a civil government, as he claimed to do in his proclamation, Botts then cited the decision of Chief Justice Marshall in the case of the American Insurance Company vs. Canter, 1 Peters.³

He then took up the question of the legal effect of the congressional legislation on the constitution which they were

¹ Browne, *Debates*, 274.

² According to Riley, who referred to the Secretary of War as his authority, California had a civil government at this time; according to the messages of the President and the Buchanan letter, a *de facto* military government existed with "the presumed consent of the inhabitants." See Browne, *Debates*, 275-78. The letter may be found in *California Message and Correspondence*, 6-9.

³ Browne, *Debates*, 275-79.

forming. The decision of the Supreme Court just referred to based its authority for asserting congressional control over the inhabitants of acquired territory on that clause in the Constitution which asserted that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." Botts declared that this clause in the United States Constitution was not to be construed in any such way. The clause gave Congress control of the territory, but not of the inhabitants in the territory.¹ "This right of absolute government, claimed for the Congress of the United States and supported by the decision of the Supreme Court, involves exactly the question between Great Britain and the colonies."²

In conclusion he declared there was no existing government in California; "that the right to institute one is inherent in the people; that by exercising this right, they can

¹ Browne, *Debates*, 281.

² *Ibid.*, 283. Thorpe, *Constitutional History of the American People*, II, 338-47. Thorpe's treatment of this is misleading. He paraphrases Botts's speech in full and gives it as the opinion of the leaders in California in 1849 (p. 339). He then appears to show that a large party in the Convention opposed putting the government into operation immediately after the ratification of the constitution by declaring that the resolution was passed by a vote of twenty-three to seventeen (p. 347.) As a matter of fact, Norton's resolution was carried by a unanimous vote. (Browne, *Debates*, 288.) The indications are that Botts only annoyed members of the Convention by his long speech. (See Halleck's remarks, Browne, *Debates*, 284.) Jones expressed a mild doubt as to the right of the people of California to put the state government into operation without the consent of Congress (p. 284) and Lippitt thought the question should be left open a while for reflection. The other members appear to have been decided from the beginning.

alone prepare themselves for admission" into the Union; that Congress has no authority over them until they become members of the Union; and that from the moment of its ratification, the constitution which they were forming became the supreme law of the land, and the government created by it was the only one to be recognized in California.¹

Halleck thought that the Convention had enough to do "without attempting to reconcile conflicting decisions of the Supreme Court." He thought that the state government should go into operation as soon as the constitution was ratified by the people.² McCarver, Snyder, Hastings and McDougal likewise thought so.³ A motion was then made to lay the question on the table in order to give time for reflection, and it was rejected. Lippitt then moved a recess until three o'clock in the afternoon. This was carried. At three o'clock when the Convention came together, a vote was taken on Norton's resolution and it was adopted by a unanimous vote.⁴

Miscellaneous Provisions

A committee was appointed by the Convention to receive and consider proposals and designs for a seal for the state. On Saturday, September 29th, Mr. Price, chairman of the committee, reported that but one design had been sub-

¹ Browne, *Debates*, 284.

² *Ibid.*

³ *Ibid.*, 284-85, 286, 288.

⁴ *Ibid.*, 288.

mitted. This was offered by Caleb Lyons,¹ though Robert S. Garnett has been given credit by some authorities for designing it.² In the foreground stands Minerva having sprung full grown from the brain of Jupiter, while at her feet crouches a grizzly bear feeding upon bunches of grapes. Beside the bear stands a miner with rocker and bowl. Ships are seen on the waters of the Sacramento river, and the background is formed by the snow-clad peaks of the Sierra Nevada mountains. At the top of the design is the Greek motto "Eureka" surmounted by thirty-one stars, the last representing the new state of California.³ Wozencraft offered a resolution to strike out the miner and the bear, and substitute therefor bags of gold and bales of merchandise; and Vallejo, who retained unpleasant memories of the bearflag movement, proposed to eliminate the bear only, or at least to represent the animal as secured by a lasso in the hands of a *vaquero*.⁴ But both proposals were rejected.

Some discussion had taken place over the compensation which delegates should receive, but the Convention finally fixed on a rate of \$16 a day and \$16 for every mile traveled as a fair sum for each member.⁵ A liberal allowance was

¹ Browne, *Debates*, 302; Taylor, *Eldorado*, I, 154-55, says that there were eight or ten designs submitted.

² See Hittell, *History of California*, II, 773; Hunt, *Genesis of California's First Constitution*, 51; Taylor, *Eldorado*, I, 154-55.

³ Browne, *Debates*, 304; Hittell, *History of California*, II, 773; Hunt, *Genesis*, etc., 51; Taylor, *Eldorado*, I, 154-55.

⁴ Browne, *Debates*, 322 and 323; Hittell, *History of California*, 773.

⁵ Browne, *Debates*, 289-92.

also provided for the various officers. The secretary and interpreter were voted \$28 per day each; the assistant secretary and the engraving clerk, each \$23; the sergeant-at-arms, \$22; the interpreter's clerk, \$21; the chaplain and doorkeeper, each \$16; and the page, \$4.¹ The proposition of J. Ross Browne "to print and publish, for the use of the state, one thousand copies in English and two hundred and fifty copies in Spanish, of a stenographic report of the proceedings of the Convention for \$10,000," was accepted.² On the last day of the session the Convention adopted, by a unanimous vote, a resolution offered by Sherwood granting to General Riley an annual salary of \$10,000 for his services during his term as chief executive of California. And Captain Halleck, secretary of state, was voted a salary of \$6000 per year.³

Various plans were suggested and discussed for meeting the expenses of the Convention,⁴ and for providing funds to start the new state government which was being organized.⁵ The former was paid by General Riley from the "civil fund,"—a fund raised from the collection of import duties during the interregnum.⁶ For meeting the latter demand, an ordinance was passed by the Convention just before its

¹ Browne, *Debates*, 107; 363-364.

² *Ibid.*, 163-64; Hunt, *Genesis of California's First Constitution*, 52-53; Taylor, *Eldorado*, I, 155.

³ Browne, *Debates*, 476.

⁴ *Ibid.*, 94-108 and 289.

⁵ Taylor, *Eldorado*, I, 155-56.

⁶ Bancroft, *History of California*, VI, 303. For the history of the fund see *ibid.*, 300, note.

adjournment which was to be submitted to Congress. It provided (1) that one section in every quarter township of the public lands should be granted to the state for the use of schools; (2) that seventy-two sections of the unappropriated land within the state should be granted to the state for the establishment and support of a university; (3) that four sections, selected under the directions of the Legislature, should be granted for the use of the state in establishing a seat of government and erecting buildings; (4) that five hundred thousand acres of public lands, in addition to the same amount granted to new states by the act of 1841, should be granted for the purpose of defraying the expenses of the state government, and five per cent of the proceeds of the sale of public lands, after deducting expenses, should be given for the encouragement of learning; and (5) that all salt springs, with the land adjoining, should be granted to the use of the state.¹

Certified copies of the constitution, in English and in Spanish, were to be presented to the chief executive of the territory, and eight thousand copies in English and two thousand in Spanish were ordered to be printed for general circulation.² A unanimous vote of thanks was extended "to the Honorable Robert Semple, for the faithful and impartial manner in which he has discharged the arduous and responsible duties of the chair,"³ and the "kindness and courtesy which marked the intercourse with General Riley

¹ Taylor, *Eldorado*, I, 156; Browne, *Debates*, 467.

² Browne, *Debates*, 462.

³ *Ibid.*, 473.

were likewise recognized.”¹ A committee of three was appointed to transmit a copy of the constitution to General Riley with instructions to forward the same to the President of the United States as soon as possible.² The sum of \$500 was voted Hamilton for engrossing the constitution on parchment.³ A rhetorical “address to the people of California” was unanimously adopted upon its submission by Steuart, chairman of the committee appointed to draw it up. It dealt in a general way with the nature and scope of the constitution which had just been completed, the heterogeneous composition of the Convention’s personnel, the spirit which had prevailed throughout the deliberations and the motives which had actuated members in the settlement of some of the more important questions, the rapid growth and complex nature of California’s population, and closed with an urgent appeal to the voters of the state, requesting them to affix their approval to the Convention’s work by voting in favor of adopting the constitution at the election to be held on Tuesday, November 13th, following.⁴

The Convention completed its work in the afternoon of Saturday, October 13th. “At a few minutes past three, preliminary matters being disposed of, the delegates commenced the signing. Scarcely had the first man touched his pen to the paper when the loud booming of cannon resounded

¹ Browne, *Debates*, 474; Hunt, *Genesis of California's First Constitution*, 53.

² Browne, *Debates*, 473.

³ *Ibid.*, 475; Taylor, *Eldorado*, I, 163.

⁴ Browne, *Debates*, 474-75.

through the hall. At the same moment the flags of the different Head-Quarters, and on board the ships in the port, were slowly unfurled, and run up. As the firing of the national salute of thirty-one guns proceeded, . . . and the signing of the constitution went on, . . . the captain of an English bark then in port paid a most beautiful and befitting compliment to the occasion and the country, by hoisting at his main the American flag above those of every other nation, making, at the moment that the thirty-first gun was fired, a line of colors from the main truck to the vessel's deck. And when, at last, that thirty-first gun came—the first gun for California!—three as hearty and as patriotic cheers as ever broke from human lips, were given by the Convention for the new state.”¹

The document signed at this time remained the fundamental law of California for thirty years. On the whole it was a constitution of which its framers might well be proud. Within its articles were embodied those provisions for personal freedom and individual protection for which the English race has contended since the meeting of king and nobles at Runnymede, and the sections comprising the completed document were based on models embodying fundamental laws and principles whose soundness had been thoroughly tested. A unique situation had called the members of the Convention together, and they met it, usually, in an admirable manner. Criticisms were freely exchanged

¹ This account is quoted by Hunt, *Genesis of California's First Constitution*, 53-54 and taken by him from Gilbert's article in the *Alta Californian* for November 22, 1849.

on occasion, and at one time the Convention had to intervene in order to prevent Tefft and Jones from participating in an affair of honor, but on the whole the meeting was a harmonious one.

Representing all sections of the Union, they had to a wonderful extent laid aside sectional prejudices and given the new state a thoroughly liberal constitution. The clauses protecting the property of wives, providing for the election of a judiciary, and prohibiting slavery, at the same time refusing to provide against the immigration of free negroes, pledged the state to a progressive policy, and "gave the most magnificent illustration of the wonderful capacity of this people for self-government."¹ The sources of such a document will be interesting.

¹ Von Holst, *Constitutional History of the United States*, III, 463. See further Colton, *Three Years in California*; Bancroft, *History of California*, VI, 302-303; Hunt, *Genesis of California's First Constitution*, 56-57; Taylor, *Eldorado*, I, 167-168.

CHAPTER XI

SOURCES OF THE CONSTITUTION

ON the third day of the session, Wednesday, September 5th, McCarver offered a resolution that the Convention resolve itself into a committee of the whole and take the constitution of Iowa into consideration as a basis for that of California. He was immediately followed by Gwin, who explained that he had exerted himself to have a printing-press there, but found it impracticable. After consulting with various members of the Convention, he had done the next best thing; he had provided copies of the constitution of Iowa so that each member might have one and write in the margin any amendments which should occur to him. He had selected that particular constitution because it was one of the latest and shortest.¹

Sherwood thought there would be enough to do in discussing propositions consolidated by a committee without bringing the whole of any single constitution before the entire Convention. Furthermore he opposed following any single state constitution; "It was desirable to have the cream of the whole—the best material of the constitutions of the thirty states."² This was also Gilbert's opinion. He opposed adopting any one constitution as a basis unless it

¹ Browne, *Debates*, 24.

² *Ibid.*, 25.

came through the hands of the Committee. The best thing to do would be to let the Committee "take all the constitutions and report what they deemed best."¹

It was a mere matter of convenience, Gwin explained. "He wanted nothing better than to form a constitution from the thirty constitutions of the Union." He had lived in three of the old states and had carefully examined all the state constitutions. He preferred the constitution of Iowa to that of any other.²

No vote seems to have been taken on McCarver's resolution, but doubtless the Committee on the Constitution made use of the various copies of the Iowa constitution prepared by Gwin. That they also used other constitutions appears equally true. Certainly they did not pretend to originate one. The document completed at Monterey was practically a compilation of articles and sections from other state constitutions. The suggestions of Sherwood and Gilbert appear to have been adopted, but the labors of Gwin were not exercised in vain as we shall see.

The Convention was admirably suited for compiling just such a document as it finally submitted. Thirty-eight of the forty-eight delegates had been citizens of twenty-one different states in the Union. Of the total number fourteen were lawyers who were natives of eleven of the twenty-one states represented.³ Of the twenty members of the Committee on the Constitution five were lawyers, two of whom

¹ Brown, *Debates*, 25.

² *Ibid.*, 27 and 28.

³ See table in Browne, *Debates*, 478-479.

came from New York, and one each from Missouri, Wisconsin and Vermont. Gwin had taken part in the convention that drew up the constitution of Iowa in 1846,¹ and came to Monterey supplied with printed copies of that document which, it has been said, he hoped to have the Convention adopt, after introducing slight changes, as the constitution for the new state of California.²

While the Convention did not adopt the constitution of Iowa, the one completed resembled that document more than any other. There are, however, traces of half a dozen different state constitutions in the California constitution of 1849, and references made in the debates indicate that the Convention had access to many more. In fact such references show that the constitutions of the thirty states of the Union were doubtless available and that they were probably used. Both Ord and Tefft, during the first week of the Convention, while the bill of rights was under discussion, imply that they had used them.³ The former says distinctly that he "had looked over the whole thirty constitutions."⁴

On September 8th Shannon proposed two additional sections to be placed at the beginning of the bill of rights. In connection with these, he said that he "had carefully examined the constitutions of the different states" before making his selection. And during the third week of the

¹ Hunt, *Genesis of California's First Constitution*, 39.

² Browne, *Debates*, 24; Royce, *California*, 263; Bancroft, *History of California*, VI, 289; Crosby, *Events in California*, ms., 38-40.

³ Browne, *Debates*, 36 and 40; see *ibid.*, 25, 27.

⁴ *Ibid.*

Convention, September 25th, Halleck states clearly that the Committee appointed to draw up the constitution was doing its work "with the constitutions of every state in the Union before it."¹

There can be little doubt, therefore, that the Convention that drew up the constitution of California had available for making their compilation the constitutions of practically all the states in the Union. To determine, in a general way, which of these exercised influence in the debates, and which left a permanent impress on the document completed in 1849, will be the aim of this chapter.

Constitutions Influencing Debates

The Committee on the Constitution was appointed on Thursday afternoon, September 6th. On the following day they submitted a declaration of rights consisting of sixteen sections. The first nine of these were copied almost verbatim from the bill of rights in the New York constitution of 1846, and the last seven were selected at random from the constitution of Iowa for the same year.² Norton, the chairman, stated that the Committee did not intend to have the sixteen sections reported comprise a complete bill of rights. Obviously the limited time the House had given the Committee in which to prepare this part of the constitution,

¹ Browne, *Debates*, 221. References were made frequently during the debates to various state constitutions. See Browne, *Debates*, 77, 110, 165, 248, 250, 235, 371, 380, 384, 292, 70, 132, 37, 56, and 69.

² Browne, *Debates*, 30-31. Compare Poore, *Charters and Constitutions*, II, 1351-1352 and Parker, *Iowa as it is*, 207-211.

if the first article were to be a desirable one, would necessitate careful revision and a few additions by members of the Convention.¹ Shannon had already suggested the first two sections from Iowa's bill of rights as sections one and two for the first article of California's constitution, and after Ord had failed in his attempt to have a section from the Virginia constitution substituted for one of these, they were accepted by the Convention.² The first of the sixteen sections proposed by the Committee on the disfranchisement of "members of the state," was stricken out. One of the arguments which Gwin used against it was the fact that such a section had not been inserted in the constitutions of Louisiana, Arkansas, Missouri, or Florida—states whose populations contained foreign elements at the time of their admission similar to the native population of California in 1849.³ Botts then tried to have the sixteenth section of the Virginia bill of rights inserted in the California constitution, but it was rejected.⁴ Jones was more successful in his attempt to substitute the twentieth section of Iowa's bill of rights for the ninth proposed by the Committee,⁵ and the fourth amendment of the Constitution of the United States was inserted as an additional clause.⁶ A vain attempt was

¹ Browne, *Debates*, 34.

² *Ibid.*, 33 and 34. The section proposed by Ord was taken from the Virginia bill of rights. Compare Poore, *Charters and Constitutions*, II, 1908.

³ *Ibid.*, 37. The meaning is that the foreign element like the natives of California were unfamiliar with the United States laws.

⁴ *Ibid.*, 38-39. Cf. Poore, *Charters and Constitutions*, II, 1908.

⁵ *Ibid.*, 42. Cf. Parker, *Iowa as it is*, 210.

⁶ *Ibid.*, 47-48. Cf. *U. S. Constitution*, 4th amendment.

made to insert as an addition, the last section from the bill of rights in the constitution of Arkansas,¹ and a similar fate met the proposal to add the sixth amendment from the United States Constitution.²

The point we are considering here, however, does not concern the omissions or insertions of sections from other constitutions, but is rather to determine which of those documents were clearly used by the Convention in drawing up the constitution of 1849. It will be seen from the above that the bill of rights was compiled from the constitutions of the United States and from the states of New York and Iowa; and that attempts were made to insert, either as additions or as substitutes, sections from the state constitutions of Virginia and Arkansas. And as a reason for rejecting one section, the constitutions of Louisiana, Arkansas, Missouri,³ and Florida were cited. Or briefly, it will be seen that eight constitutions were used in preparing the Bill of Rights.

If we examine briefly the discussions over various sections of the articles on the departments of government, we shall find there also that the Convention consulted several state constitutions before completing its work. While the very first section of article four on the legislative department was before the committee of the whole, Gwin referred to the provisions made for biennial sessions of the legislatures of

¹ Browne, *Debates*, 50.

² *Ibid.*, 293-94.

³ There can be no doubt that the constitution of Missouri was accessible. See Browne, *Debates*, 331, McCarver's speech.

all the new states, citing particularly Texas, Louisiana, Mississippi, Arkansas, Tennessee, Illinois, Missouri, Iowa, Wisconsin, and Michigan as an argument in favor of biennial sessions for the California Legislature.¹ Shannon referred to the constitution of New York when section five was under consideration,² and Jones put forward the constitution of Iowa as a desirable model to follow in determining the number of days a bill might be retained by the governor before returning it to the Legislature.³ Semple at the same time had the constitution of Illinois before him and quoted from it a few minutes later.⁴ Gwin read the eighteenth section of the constitution of Michigan, and it was embodied in the California constitution, minus the last clause, as the twenty-fourth section of article four.⁵ References were made to the constitutions of Louisiana and Wisconsin while the sections on banking were under consideration.

¹ Browne, *Debates*, 77. What Gwin means evidently is that these new states had profited by the experience of the older states that had adopted annual sessions during their early statehood, and suffered from excessive legislation as a result.

The constitution of the republic of Texas had provided for annual sessions, but changed to biennial when it came into the Union in 1845. (Poore, *Charters and Constitutions*, II, 1754, 1769). Mississippi under her first constitution likewise held annual, but in the constitution of 1832 changed to biennial sessions (*ibid.*, 1059, 1071.) The Michigan constitution of 1835 and that of Wisconsin for 1848 both provided for annual sessions (*ibid.*, I, 986; II, 2031). The first two sessions of the Missouri and Tennessee legislatures (1820-21 and 1796-97) were annual, after which biennial sessions were held (*ibid.*, II, 1108, 1668).

² *Ibid.*, 84.

³ *Ibid.*, 87.

⁴ *Ibid.*, 88.

⁵ *Ibid.*, 90.

Article five on the executive department produced little discussion and few changes were made, the recommendations of the Committee being accepted practically as submitted. There was no lack of discussion over the sixth article, on the judiciary, but few specific references were made to state constitutions. It was in connection with the consideration of this article, however, that Halleck made the statement to which reference has been made already, that the "Committee, with the constitutions of every state in the Union before it, has been at work three days on this report." ¹

Two more references remain to be noticed. While the section on taxation was under consideration, Botts consulted the constitution of Alabama to prove that Halleck had misquoted a section from that document.² And very much earlier, on the second Wednesday of the session, while the subject of apportionment was before the House, Jones speaks of having consulted briefly "within the past few minutes" the constitutions of Maine, Pennsylvania, Delaware, Kentucky, Tennessee, Indiana, Louisiana, Illinois, Alabama, Missouri, Michigan and Arkansas.³ The constitution of South Carolina was consulted at the same time by Shannon.⁴

To summarize, then: the constitutions of the United States and of twenty individual states were cited during the proceedings of the Convention, and reference to them

¹ Browne, *Debates*, 221.

² *Ibid.*, 371.

³ *Ibid.*, 56.

⁴ *Ibid.*

was made, in the majority of cases, in such a way as to leave little doubt of their accessibility. No attempt has been made here to give the number of different references to each constitution.¹ The Committee, in performing its part of the work, evidently consulted nearly if not all of them, presumably many times, but drew their material from only a few. On the whole comparatively few changes or additions were made in the Committee's recommendations. It was in debating these, however, that reference to the individual state constitutions occurred. The constitutions of all the thirty states were not named individually in the discussion, but a general reference to them was made on four different occasions.² This can leave no doubt as to their influence. It remains to be seen how much the completed document of 1849 resembled the constitutions of other states.

Constitutions Compared

The preamble of California's constitution is taken from the New York constitution of 1846.³ The general arrangement of articles is different from that of any of the state constitutions, but resembles that of Iowa more than any other. The third and fourth articles of the California con-

¹ Doubtless the constitutions of Iowa and New York were cited more frequently than others. Reference was made to the Louisiana document, however, on at least six different occasions. See Browne, *Debates*, 248, 250, 371, 380, 384, and 385.

² Browne, *Debates*, 36, 40, 72, 221

³ For a comparison of the constitutions see Poore, *Charters and Constitutions*.

stitution are combined under the third article of the Iowa document. Both constitutions contain twelve articles, but the latter includes the schedule as a part of the constitution, whereas the former does not. The California document gives an article to the boundary, but Iowa includes the boundary with its preamble. Corporations and banks are treated separately in the latter, but in the former are included among the sections in the legislative department. With these exceptions the articles in the constitution of California, their arrangement, and the headings of each are similar to the constitution of Iowa.¹

Also in content the two constitutions are very similar. Article one of California's Bill of Rights has fourteen of its twenty-one sections taken almost verbatim from the bill of rights of Iowa's constitution. Section four of article two was taken from article two, section three of the constitution of New York, but the other five sections on the suffrage undoubtedly came from the second article of Iowa's constitution. Articles three and four of the constitution of 1849 on the distribution of powers and the legislative department are combined in the constitution of Iowa, as already indicated. The California document, however, has twenty-five of the thirty-eight sections included in the two articles taken from article three of the constitution of Iowa. Of the remaining sections, the twenty-fourth was copied from article five, section eighteen of the constitution of Michigan, 1835,²

¹ The references made to Iowa and New York will be to the constitutions of those states drawn up in 1846 unless otherwise stated.

² Browne, *Debates*, 90.

and sections thirty-one to thirty-seven inclusive were taken doubtless from the constitution of New York. Article five, on the executive department, contains twenty-one sections, of which thirteen came from article four of the constitution of Iowa.

The article on the judiciary is more difficult to trace. The sections were selected apparently from different sources. The first two doubtless came from sections one and two of the article on the judicial department in the constitution of Iowa. Section five may have been taken from the sixth section of the fourth article of the constitution of Texas, 1845; and the seventeenth section evidently comes from the constitution of Tennessee (1834), article four, section nine. The seventh article is taken clearly from article nine of the constitution of Michigan, 1835, the second section of the latter being omitted when copied into the California constitution. The article on the state debt is just like article seven of the constitution of Iowa, except that the maximum amount of the debt to be incurred is \$100,000 in Iowa and \$300,000 in California. Again, articles nine in the constitutions of these two states are similar, except for the omission of one section in the organic law of California which the Iowa document contains. The constitution of New York, article thirteen, was taken as a guide by the Convention for article ten of the constitution of 1849.

In the miscellaneous provisions, article eleven, there is difficulty again in discovering sources. Some of the sections may be original, but the sources of more than half of them are tolerably clear. The second section is undoubtedly

copied from article one hundred and thirty, title six, of the constitution of Louisiana, 1845.¹ Sections thirteen, seventeen, eighteen, nineteen and twenty-one were probably taken from the same source.² Section three is like article twelve of New York. The fifth, sixth and ninth sections are practically the same in content as section nine, article thirteen of the constitution of Wisconsin. Section eleven may possibly be taken from the seventh article of section ten of the Mississippi constitution of 1832, or it may come from Wisconsin, article four, section twenty-seven.

Statements of Historians

Frost, *History of California*, published in 1857, says that the constitution of 1849 "combines the best features of the constitutions of the states east of the Rocky mountains, and is in most respects similar to that of the state of New York."³

In his *History of California* Tuthill declares that Iowa's was the only state constitution accessible at the beginning, but "as the session advanced, the constitution of New York was oftener consulted, and when the Convention finished its labors their perfected instrument resembled more that of the Empire State than any other."⁴ Royce says that in general character the constitution adopted followed that

¹ Browne, *Debates*, 248.

² Compare these with the Louisiana constitution, title six, articles 127, 91, 92, 98, and 132.

³ Frost, *History of California*, 125.

⁴ Tuthill, *History of California*, 266-67.

of New York state.¹ Bancroft's statement is more general. The members of the Convention, he says, chose their material from the constitutions of the several states with the workings of which they were familiar.² Willey declares that the constitutions of other states were obtained by the Convention, but implies that those of "Iowa and New York" were more frequently used than the others.³ That the constitutions of Michigan, Virginia, Louisiana, and Mississippi left their influence on the California constitution Dr. Hunt admits, but says "the two great models" were the "constitutions of New York and Iowa."⁴ In this he is right, but the order, as we have seen, should be Iowa and New York.

There are, excluding the article on the boundary, one hundred and thirty-six sections in the California constitution. Of these about seventy are taken from the constitution of Iowa and about twenty from that of New York.⁵ The other state constitutions, whose influence is discernible in the finished product of the Monterey Convention, are those of Louisiana, Wisconsin, Michigan, Texas, and Mississippi.

To summarize briefly: the constitutions of all the states in the Union were doubtless accessible to members of the Con-

¹ Royce, *History of California*, 270.

² Bancroft, *History of California*, VI, 290.

³ Willey, *Transition Period*, 94.

⁴ Hunt, *Genesis of California's First Constitution*, 56.

⁵ The exact numbers as I have counted them are sixty-six and nineteen respectively. I am inclined to think, however, that there are more. I make no pretence of having traced the exact source of *every* section in the constitution, but I have traced the large majority of them.

vention; all of them, together with the United States Constitution, exercised influence in the debates; and the influence of eight, besides the Constitution of the United States, is discernible in the California constitution adopted at Monterey in 1849.

PART III

THE ORGANIZATION OF STATE GOVERNMENT

CHAPTER XII

ELECTION AND ORGANIZATION OF THE FIRST LEGISLATURE

IN anticipation of an early rainy season the Convention had provided for submitting the constitution for ratification as soon as possible after their adjournment.¹ Copies were printed in San Francisco and scattered throughout the country, together with an address to the people signed by the delegates and a proclamation from the Governor. The election of members for the first Legislature was to be held on the same day that voters expressed their acceptance or rejection of the constitution—Tuesday, November 13th.²

The Governor's proclamation directed the prefects of the several districts, or the sub-prefects or senior judges of first instance in case the former office should be vacant, to see that the elections were held in their respective districts on the day specified. The rules governing elections were to be the same as those given in the Governor's proclamation of June 3rd, except that the prefect in charge (or his substitute) should have power to designate any additional number of places for opening the polls. A regular poll list was to be kept by the judges and inspectors in each voting precinct. It was to be the duty of such judges and inspectors to receive the votes of the electors qualified to vote at such elections. Each voter was to express his opinion by deposit-

¹ See section six of the schedule attached to the constitution for 1849.

² Bancroft, *History of California*, VI, 303.

ing a ticket in the ballot-box on which was to be written or printed "For the constitution" or "Against the constitution," or some similar expression which would convey his intention. At the close of the election the inspectors were to count the votes immediately, and make duplicate returns to the presiding officer of the district, who was to transmit the same, "by the most safe and rapid conveyance, to the Secretary of State." Upon receipt of the returns, or if the returns were not received earlier, on the 10th of December, the Secretary of State, acting with one of the judges of the superior court, the prefect, judge of first instance, and an alcalde of the Monterey district as a board of canvassers, or any three of the officers named, were to compare the votes given at the election in the presence of all who should care to attend, and publish an abstract of the same in one or more newspapers. If the constitution were ratified, the Governor was to make the fact known by a proclamation to that effect, and was to forward a copy of the same to the President of the United States.

At the same election votes were to be cast for a governor, lieutenant governor, members of the state Legislature, and two members of Congress. The Legislature, providing the constitution were adopted, was to meet at the capital (San José) on the 15th of December. A president *pro tempore* was to be elected by the Senate until the lieutenant governor was installed in office. Two senators to Congress were to be chosen by the Legislature within four days after its organization.¹

¹ See schedule appended to constitution.

Electioneering

There seems to have been no doubt that the constitution would be ratified, and political aspirants for office began active canvassing as soon as the Convention adjourned. The large majority of candidates ran independently and little attempt was made to draw party lines.¹ On October 25th the Democrats held a mass meeting in San Francisco over which John W. Geary presided. So large was the attendance that the people had to adjourn from a hall to the public square. In their resolutions they rejected "*partyism* for the sake of party merely," but declared themselves in favor "of principles, which have for their object the preservation of our glorious constitution, . . . and ever looks to an honorable extension of the area of freedom." They declared further that they could not consistently support any one for an office of public trust who had denounced the Mexican war as unjust and unnecessary or who "would have refused to vote supplies for our gallant little army" while that struggle was in progress. The "union of Californians for the sake of California," they declared to be well, but "a union of Californians for the sake of California and the Union" was better. "We are for our country first, our country last, and our country all the time; not a section, not a circumscribed locality, not a limited interest, but the *whole country*." A resolution passed at an adjourned meeting held on October 27th declared in favor of electing eleven delegates by party vote whose business it should be to select a ticket

¹ Davis, *Political Conventions*, 5.

to be recommended to the Democratic party. The candidates were to be "pledged to vote for no man for United States senator unless he would uphold exemption of household for debt, and would vote for the formation of a railroad through our own territory in preference to any other."¹

No candidates appear to have been nominated by the party, however, and its importance seems to be due solely to the fact that it was the first political mass meeting held in California.

A non-partisan meeting was held at Monterey five days later at which General Riley was nominated for governor, but he declined to run and Sherwood was named in his place. Lippitt was nominated for lieutenant governor, and Gilbert and Ord for Congress. Among the other candidates for governor, all of whom ran independently, were Peter H. Burnett, John A. Sutter, W. M. Steuart, and John W. Geary; for lieutenant governor, John McDougal, Richard Roman, John A. Frisbie, A. M. Winn, and Pablo de la Guerra. Some of these had been indorsed or recommended by public meetings in different parts of the state, but with the exception of the effort at San Francisco no attempt was "made to organize a party, or fight the battle upon the old issue of Democrat and Whig."² The candidates seem to have done their canvassing independently, and to have confined their efforts largely to the mining regions. With their bundles of tickets and their copies of the constitution they moved from mining camp to mining camp soliciting votes, and occa-

¹ Davis, *Political Conventions*, 2-4.

² *Ibid.*, 5.

sionally assembled in a common tent in the evening to smoke their cigars and talk over the prospects of election.¹

The Election

The rainy season during the winter of 1849-50 began a month earlier than usual and was exceptionally severe. The morning of November 13th was a dismal one, and the outlook for a satisfactory vote was most discouraging. To expect much enthusiasm under such conditions was out of the question. The mud and swollen streams made journeying, for any great distance at least, very trying indeed.² The election was held as planned, however, and considering the circumstances a fairly good vote was polled.

An eye-witness of the election in one of the mining towns has left a description of some incidents of the day which illustrate the Argonaut's love of chance even in an election.

"The choosing of candidates from lists, nearly all of whom were entirely unknown, was very amusing. Names, in many instances, were made to stand for principles; accordingly a Mr. Fair got many votes. One of the candidates, who had been on the river a few days previous wearing a high-crowned silk hat, with narrow brim, lost about twenty votes on that account. Some went no further than to vote for those whom they actually knew. One who took the opposite extreme, justified himself in this wise: 'When I left home,' said he, 'I was determined to go *it blind*. I went

¹ See the description of a knot of politicians in Taylor, *Eldorado*, I, 237.

² Davis, *Political Conventions*, 5; Taylor, *Eldorado*, II, 6.

it blind in coming to California, and I'm not going to stop now. I voted for the constitution and I've never seen the constitution. I voted for all the candidates and I don't know a damned one of them." ¹

The native Californians and the resident Mexicans who were entitled to vote, seem to have taken a special interest in casting their first ballot. It made little difference to them what the ticket was, their self-esteem seems to have been flattered and their self-importance increased as a result. ²

There was a total vote on the constitution of 12,872 of which number 12,061 were in favor of and 811 against it. ³ The votes by districts were as follows: ⁴

	<i>For Constitution</i>	<i>Against Constitution</i>
San Diego	242	1
Los Angeles	315	17
Santa Barbara	184	0
San Luis Obispo	44	0
Monterey	357	3
San José	567	10
San Francisco ⁵	2051	5
Sonoma	602	5
Sacramento	5296	633
San Joaquin	2403	137

¹ Taylor, *Eldorado*, II, 6-7.

² *Ibid.*, 7.

³ There were from 1200 to 1500 blank votes in addition which were thrown out because they did not have the words "For the constitution" or "Against the constitution" on the ballot. See Browne, *Debates*, Appendix XXI.

⁴ The data for this information was taken from the *Election Returns for 1849*, ms., in the archives of the state library.

⁵ San Francisco expected to poll 5000 votes, but the disagreeable weather interfered. Davis, *Political Conventions*, gives the number of votes polled as 3169. See p. 5.

The votes for governor were as follows: Peter H. Burnett, 6783; W. Scott Sherwood, 3220; J. W. Geary, 1358; John A. Sutter, 2201; Wm. M. Steuart, 619; scattering, 32.

For lieutenant governor: John McDougal, 7374; R. Roman, 2368; Francis J. Lippitt, 1127; J. B. Frisbie, 1558; A. M. Alwin (or Winn), 802; P. de la Guerra, 129; Burnett, 242; scattering, 121.

For Congress: G. W. Wright, 5451; Edward Gilbert, 5300; Rodman M. Price, 4040; P. A. Morse, 2066; Lewis Dent, 2127; E. J. C. Kewen, 1826; Wm. M. Sheppard, 1773; W. E. Shannon, 1327; Peter Halstead, 593; L. W. Hastings, 215; P. B. Reading, 232; W. H. Russell, 92; J. Thompson, 86; K. H. Dimmick, 41; scattering, 299.

Burnett and McDougal were therefore elected governor and lieutenant governor, and Wright and Gilbert became the first representatives to Congress.¹

The population of California at this time has been estimated at 107,000 by Bancroft, of whom 76,000 were Americans; 18,000, foreigners; and 13,000 natives. Omitting the twelve or fifteen hundred votes that were thrown out on account of being defective, it will be remembered that a total vote of 12,872 was cast on the constitution, or a vote

¹ *Election Returns for 1849*, ms. These returns may be found, with some slight variations, in *Journals of California Legislature*, 1850, 12-14; Davis, *Political Conventions*, 5; and in part in Bancroft, *History of California*, VI, 305-06.

San José gave Burnett 517 and Sherwood 36 votes. According to Hall, *History of San José*, 203-04, this was due to the fact that Burnett had a family, and especially that in the family were two beautiful daughters. "At that time men stood on tip-toe to get a sight of a female; she appeared as novel as a curiosity shop."

equalling a little over one-sixth of the American population.¹ Considering the shifting character of the people, the gold excitement, the intense interest in various commercial pursuits, and the increased difficulty of communication as a result of severe rains, the total vote polled was probably as large as could have been expected.²

Organizing the Machinery of Government

California's first Legislature met at Pueblo de San José on Saturday, December 15, 1849. There were present at noon on that day but five senators and fourteen assemblymen, an insufficient number in both cases to constitute a quorum, so that both Houses adjourned until the following Monday.³ In the meantime several additional members arrived. When the two Houses met on December 17th, there were fifteen in the Senate and thirty-two in the Assembly.⁴ The seat in the Upper House for the district of Sonoma⁵ was claimed by Jonas Spect and M. G. Vallejo. The dispute was placed in the hands of a committee on elections, and on December 19th, Crosby, chairman of the com-

¹ Bancroft, *History of California*, VI, 305.

² In the mining camp where Taylor spent election day, 105, or about one-half of those entitled to the franchise, exercised their privilege. Taylor, *Eldorado*, II, 7.

³ *Journals of the California Legislature*, 1850, 3 and 575.

⁴ *Ibid.*, 8 and 576.

⁵ The state had not been divided into counties, of course; so the districts into which California had been divided by Governor Riley's proclamation were used as political units.

mittee, recommended that Spect be admitted as Sonoma's representative until the election returns could be procured by the committee and the dispute satisfactorily settled.¹ On December 22nd, after having examined the official returns, the committee through its chairman declared that the result of the election for state senator in the Sonoma district was as follows: M. G. Vallejo, 199 votes; Jonas Spect, 181.² Spect was therefore succeeded by Vallejo.

The Upper House as finally organized contained a total membership of sixteen, the various districts being represented as follows: San Diego by E. Kirby Chamberlin, a native of Connecticut; Los Angeles by A. W. Hoppe, a native of Virginia; Santa Barbara and San Luis Obispo by Pablo de la Guerra, a native of California; Monterey by S. E. Woodworth, a son of the author of the "Old Oaken Bucket," and a native of New York; San José by W. R. Bassham, a native of Tennessee; San Francisco by Nathaniel Bennett³ of New York and G. B. Post of New Jersey, both of whom resigned a little later and were succeeded by D. C. Broderick, a native of New York,⁴ and E. Hydenfeldt, a native of South Carolina; Sonoma by Vallejo, a native of California; Sacramento by John Bidwell and E. O. Crosby, both of New York, H. E. Robinson of Connecticut and T. J. Green of North Carolina; San Joaquin by D. F. Douglass of Tennessee, B. S. Lippincott of New York, Nelson Taylor of

¹ *Journals of the California Legislature*, 1850, 16.

² *Ibid.*, 398.

³ Bennett was elected associate justice of the Supreme Court, December 22nd. *Journals of California Legislature*, 1850, 620.

⁴ Broderick was born in Washington, D. C., but was raised in New York.

Connecticut (succeeded a little later by W. D. Fair of Virginia), and T. A. Vermeule of New Jersey.¹

As originally organized, therefore, there were eleven men from northern states in the Senate, three from southern, and two natives. The proportion was changed by resignations so that there were nine northerners and five southerners. The mining districts had just half of the total representation.

In the Assembly ² San Diego was represented by O. S. Witherby of Ohio; San Luis Obispo by H. A. Tefft of Wisconsin; Los Angeles by A. P. Crittenden of Kentucky and M. Martin, nativity unknown. Martin resigned January 28th, and his place remained vacant throughout the remainder of the session. Santa Barbara was represented by John Scott of Scotland and J. M. Covarrubias of France; Monterey by T. R. Per Lee of New York and J. S. Gray of Pennsylvania; Sonoma by J. E. Brackett of New York and J. T. Bradford of Illinois; San José by Joseph Aram of New York, Benjamin Corey of Ohio, and Elam Brown of New York; San Francisco by Edmund Randolph of Virginia, Alexander Patterson of New York, L. Stowell, probably of Washington, D. C., Samuel J. Clarke, probably of New York, and W. Van Voochies. The last named resigned to become secretary of state. A new member, John H. Watson,

¹ The data for this was collected from various sources. See p. 258, note 5.

² The names of thirty-two of the assemblymen are given in *Journals of California Legislature*, 1850, 576. There were other members who came in later as will be seen.

a southerner, entered December 18th, and was succeeded on March 7th by Alfred Wheeler of New York.¹ The representatives from Sacramento were H. C. Cardwell of Vermont, J. T. Hughes of Kentucky, E. W. McKinstry of Michigan, W. D. Dickinson, who was succeeded on December 18th by John Bidwell of New York, G. B. Tingley of Ohio, Madison Walthall of Virginia, J. F. Williams of New York, John Bigler of Pennsylvania, who entered December 18th,² and succeeded White as speaker of the Assembly later, P. B. Cornwall of New York, and J. F. White, speaker, probably of Florida. Cornwall and White resigned and were succeeded by Grove Deal of Pennsylvania and John Henley of Indiana³ respectively. From San Joaquin came B. F. Moore of Florida; R. W. Heath of Maryland; D. P. Baldwin of Alabama; C. M. Creaner of Pennsylvania (he had lived in Louisiana so long that he had become a southerner in sympathy)⁴; J. S. K. Ogier of South Carolina; James C. Morehead of Kentucky; and J. N. Van Benschoten of New York. Van Benschoten's name does not appear among those present on December 17th, but he entered within three days after that date.⁵ J. F. Stevens, nativity unknown, had likewise entered by December 20th.⁶ San Joaquin thus had a total representation of eight members. On February 18th,

¹ *Journals of California Legislature*, 1850, 580 and 966.

² *Ibid.*, 582.

³ *Ibid.*, 935 and 1010. Deal entered March 2nd and Henley, March 15th.

⁴ This is reported by his daughter who at present works in the state library.

⁵ *Journals of California Legislature*, 1850, 594.

⁶ *Ibid.*

Van Benschoten and Heath resigned,¹ and, on March 2nd and 30th respectively, Stevens and Creaner tendered their resignations,² the latter to become district judge. E. B. Bateman of Missouri was elected to succeed Stevens and took his seat March 29th.³ John Cave of Kentucky and W. M. Shepherd, nativity unknown, entered March 26th.⁴

The first Legislature was thus composed of thirty-six members, of which number the mining districts, Sacramento and San Joaquin, had just half. Nineteen were men from northern states, ten from southern, the nativities of five are unknown, and two were foreigners. As a result of resignations and subsequent elections, the total number was reduced to thirty-four during the last half of the session. Nineteen of these, as formerly, were from northern, ten from southern states, three unknown, and two were foreigners.⁵

¹ *Journals of California Legislature*, 1850, 869.

² *Ibid.*, 1093.

³ *Ibid.*

⁴ *Ibid.*, 1078 and 1079.

⁵ The nativities of the members of the first Legislature are not given in any one place so far as the writer knows. Bancroft, *History of California*, VI, 309-10, notes 3 and 4 gives most of them. Thompson and West, *History of San Joaquin County*, 24, (Oakland, 1879), contains a complete table of the senators giving the names of the members from the various districts, the states in which they were born, the states from which they emigrated to California, and the date of their arrival. The Assembly list given there is practically the same as that given in Alley, Bowen & Company, *Histories of Sonoma and Santa Clara Counties*, pp. 136-38 and 153-55 respectively, and Slocum's *History of Contra Costa County*, 211-14. With the exception of the list of senators given in the history of San Joaquin County, the names and data given in these county histories were taken from the Sacramento "Society of California Pioneers" ms. This contains thirty-one autobiographies of members of the first Legislature written in their own hand writing,

On Monday, December 17th, a resolution passed the Upper House requiring the president to appoint a committee to inform the Assembly that the Senate had organized and had elected E. K. Chamberlin, president pro tempore; James F. Howe, secretary; Wm. B. Olds, assistant secretary; Bela Dexter, engrossing clerk; Thomas S. Austin, sergeant-at-arms; and Eugene F. Russell, doorkeeper; and that they were now ready to proceed to business. Green and Lippincott were appointed on the committee.¹ During the afternoon session of the same day, the Senate received a similar message from the Assembly.² On the following day the two Houses met in joint session for the purpose of examining the original returns of the recent election for governor, lieutenant governor, and members of Congress;³ and on Wednesday another communication came from the Assembly notifying the Senate that the House had "concurred in their

that of Vallejo and de Guerra appearing in Spanish, and was given to the state library by the Sacramento Society of California Pioneers. The list was evidently collected by Bradford, a member of the Assembly from Sonoma. (See *Sonoma County History*, 136.) The fact that it is so incomplete would indicate that it was collected after the first Legislature adjourned. Tinkham's *History of Stockton*, 125-26, gives a list of delegates from the district of San Joaquin, but gives no data on nativity. Additional data on the nativities of assemblymen may be found in Bancroft's *Pioneer Register and Index*; Smythe's *History of San Diego*, 292; Cornwall's *Biography of Cornwall*; Shuck's *Benck and Bar*; Wood's *History of Alameda County*, 186-7; *San Francisco Call*, July 18, 1859; and December 27, 1882; *Alta Californian*, September 7, 1866; *Sacramento Union*, February 1, 1861; *Annals of San Francisco*, 710; Upham, *Scenes in El Dorado*, 592.

¹ *Journals of the California Legislature*, 1850, 8.

² *Ibid.*, 10.

³ *Ibid.*, 12-14.

resolution appointing a joint committee to wait upon the Governor elect (Burnett), and notify him that the two Houses of the Legislature" were organized and were ready to proceed to the inauguration, as soon as it was convenient for him.¹ Also they reported that they "concurred in the resolution appointing a joint committee to wait upon his Excellency Governor Riley, informing him of the organization of both Houses of the Legislature," and that they were ready to receive any communication which he might desire to make. They further agreed to the Senate resolution requesting Colonel Allen, the general post-office agent for California, to establish a daily mail line from San José to San Francisco.² On December 20th (Thursday) the two Houses met in convention in the assembly hall, the president of the Senate presiding. Hon. Peter H. Burnett was introduced, and the oath of office was administered to him by Chief Justice Dimmick. Hon. John McDougal also took the oath of office as lieutenant governor. An inaugural address was delivered by Governor Burnett, and the convention was dissolved. McDougal, when the Senate assembled in its own hall, immediately assumed his duties as president of that body.³

In the afternoon of the same day the two Houses again assembled in convention for the purpose of electing United States senators, McDougal, the president of the Senate, presiding.⁴ The candidates were John C. Frémont, William

¹ *Journals of the California Legislature*, 1850, 16.

² *Ibid.*

³ *Ibid.*, 20.

⁴ *Ibid.*, 23.

M. Gwin, H. W. Halleck, Thomas J. Henley, Thomas Butler King, J. W. Geary, and Robert Semple. Each member of the Legislature voted *viva voce* and for two men for the Senate. As a result of the first vote John C. Frémont received twenty-nine votes and Gwin, twenty-two. Frémont was declared elected and the voting for the second senator continued. On the third joint vote Gwin received twenty-four, and was also declared elected.¹

On December 21st, William Voorhies was nominated secretary of state by Governor Burnett, and the nomination was immediately confirmed by the Senate. Voorhies resigned his seat in the House on the same day.² On the following day the two Houses met in convention and proceeded to the election of a state treasurer, a comptroller, an attorney general, a surveyor general, a chief justice of the Supreme Court, and two associate justices. The following men were

¹ *Journals of the California Legislature*, 1850, 23-24. The candidates for the United States Senate had come to the capital early, and just preceding and during the election "kept *ranches*, as they were termed—that is, they kept open house. All who entered drank free, and freely. . . . Every man who drank, of course, wished that the owner of the establishment might be the successful candidate for the Senate. That wish would be expressed half a dozen times a day, in as many different houses." Hall, *History of San José*, 220-21. It was doubtless due to this that the appellation of the "Legislature of a thousand drinks" was applied to California's Senate and Assembly of 1849-50. See *ibid.*, 218 and Bancroft, *History of California*, VI, 309-11.

² *Ibid.*, 27. There is in the state archives a letter signed by Myron Norton, written from San Francisco, November 20, 1849, and addressed to the Governor, requesting the appointment of secretary of state. It was accompanied by a petition signed by about half of the members of the Senate. The petition is dated December 17, 1849.

elected to fill the respective positions: Richard Roman, John S. Houston, E. J. C. Kewen, Charles J. Whiting, S. C. Hastings, Henry A. Lyons, and Nathaniel Bennett.¹ Committees were appointed on claims, on finance, on the judiciary, on the militia, on counties, on privileges, on engrossed bills, on a state library, on public printing, and on public buildings.² On December 21st was added to these a committee of commerce.³ The organization completed, the two Houses waited in their respective places for the Governor's first annual message before beginning the active work of legislation.

¹ *Journals of the California Legislature*, 1850, 48-55.

² *Ibid.*, 28.

³ *Ibid.*, 595.

CHAPTER XIII

THE GOVERNOR'S MESSAGE AND FINANCE

THE first annual message of Governor Burnett was received by the Legislature on Friday, December 21st, the same day on which the organization of that body was completed. It dealt at some length with the following subjects in the order named: the right of the Legislature to proceed with business; the adoption of a civil and criminal code of law for the government of California; the question of revenue; the admission of free negroes; the election of certain officers; and the establishment of city and town governments.

After a eulogy on California and its rapid progress during the past twenty months, the Governor said the first question that the Legislature would have to determine was whether they should proceed at once with the general business of legislation or await the action of Congress upon the question of California's admission into the Union.¹ He thought they had a perfect right to proceed. The governments of Missouri and Michigan were in full operation, he said, when those

¹ The members of the Legislature seem to have had no doubt of their right to proceed with the business of the state before its formal admission into the Union. That question had already been settled at the polls by the adoption of a state constitution, and in consenting to their election they accepted the responsibility of proceeding with legislation.

states were admitted, and afforded ample precedents for the action of California.

This question settled, the Legislature should turn its attention to providing the state with necessary laws. The adoption of a civil and criminal code of some kind was imperative. It was the more important because the action of the first would hardly be disturbed by succeeding legislatures. California was in a position to adopt the most improved and enlightened code of laws to be found in any of the states. The Governor claimed to have given the matter serious study, and recommended the adoption of the following—at least in so far as they were applicable to conditions in California, and were not modified by the constitution or by the acts of the Legislature: (1) the definition of crimes and misdemeanors contained in the common law of England; (2) the English law of evidence; (3) the English commercial law; (4) the civil code of the state of Louisiana; and (5) the Louisiana code of practice.

Particular attention was called to the “grave and delicate subject of the revenue.” The current expenses of state government for the first year would be \$500,000 or more. This would have to be raised either by loan or by taxation. The exorbitant rate of interest which the state would have to pay together with the moral obligation which such an act would place on posterity rendered the first too objectionable for consideration. He therefore recommended the imposition of a poll tax, and a tax upon real and personal property in proportion to its value, and, further, that the revenue law be so framed as to require the collector to accompany

the assessor. If this were not done "one-half the revenue, in some districts, would be lost, in consequence of the frequent change of residence."

A reasonable and sound system of taxation would operate most beneficially upon the agricultural resources of the country in a very short time. "Most of the fine agricultural lands of California are now in the hands of a few persons, who suffer them to remain wild and uncultivated. A few months ago when the population was small, and the wants of the community few and simple, the natural pasturage of the country, with a limited cultivation of the soil, was ample for all the purposes of life; but under the changed circumstances, when our country teems with people who must be fed, and when the population is so rapidly augmenting, it is unreasonable, if not impossible, that the country should remain in a state of nature."

When the people who owned these rich, fertile lands were obliged to pay taxes on the same in proportion to their value, they would find it to their interest to sell a part to others who would cultivate them. Thus the system of taxation which he suggested would encourage the agricultural industry of the country, and at the same time greatly increase the value of the land.

The native Californians might at first object to such a system of taxation, but they would soon become accustomed to it. They would also see that the Legislature had no power or right either to favor or to oppress any class of persons, but looked to the property itself regardless of the owner. "They will also learn that the same American manufactures,

upon which they are accustomed to pay such high duties, now come into our ports duty free, and that they are compensated for the direct taxes they pay in the increased value of their property, and the decreased prices of the merchandise they consume."

On the admission of free negroes into the state, the Governor spoke most urgently. He had no patience with that "weak and sickly sympathy—that misplaced mercy, that would hesitate to adopt salutary measures to-day, but would suffer all the inevitable consequences of to-morrow." There was but one of two consistent courses which could be taken with reference to free negroes: it was necessary either to admit them to the full and free enjoyment of all the privileges guaranteed by the constitution to others, or to exclude them from the state. If the first course were adopted they would be inevitably consigned to a subordinate and degraded position which in itself would be a species of slavery. This position would make them enemies to the society and government of the state and render them "fit teachers in all the schools of ignorance, vice, and idleness." He thought the time was rapidly approaching when the natural increase in population in the states east of the Rocky Mountains would render slave labor of little or no value. As a result of this, slaves would be manumitted in the slave states and contracts made with them to labor as hirelings for a given number of years in California, unless measures were taken to keep them out. As to the right of the state to do this, there was no question. The people had a perfect right to prevent any class of population from settling in the state

if they considered such people injurious to society. He therefore urged "most serious attention to this subject, believing it to be one of the first importance."

The message called attention to the immediate need of minor officials, and recommended that arrangements be made for the election of judges of county courts, clerks of the Supreme Court, district attorneys, sheriffs, coroners, assessors, collectors, justices of the peace, and other officers as soon as possible.

Great distress and inconvenience had been experienced already by the inhabitants of many towns because an efficient system of city government had not been established. It was therefore recommended that some general enactments applicable to the organization of cities and incorporated villages should be passed as soon as possible.

A few other things were recommended, such as the passage of a law to prevent the desertion of seamen from merchant vessels, "the establishment of an inspector for provisions at San Francisco," the division of the state into counties, provision for the acknowledgment and registration of deeds and the registration of separate property of the wife, and the protection from forced sale of a certain portion of the homestead and other property of all heads of families.¹

As soon as the message was read in the Senate, a resolution was adopted to print one thousand copies in English and five hundred in Spanish for the use of the Senate, and five

¹ *Journals of the California Legislature*, 1850, 31-41; Stryker, *American Register and Magazine*, July, 1850, Vol. IV.

hundred additional copies in English for distribution among the senators and representatives of Congress. Copies were also to be forwarded to the President of the United States. Portions of the message were referred to the various standing committees for their consideration.¹

The various subjects treated in the message were not considered by the Legislature in the order in which the Governor presented them, and will not be so treated here. The present chapter deals with finance² and will be followed by others on civil and criminal codes and the organization of courts; the organization of counties, cities, and towns; the failure of old line sectionalism; and the admission of California into the Union.

Finance

The state government that went into operation in December, 1849, was without funds to pay the ordinary expenses, or even to buy the little necessities with which to begin active business. Naturally, therefore, one of the first subjects to be considered by the Legislature was that of finance. That part of the Governor's message dealing with

¹ *Journals of the California Legislature*, 1850, 41-42. For the various committees to which different parts of the message were referred, see pp. 65 and 66. On the following day Governor Burnett transmitted to the Senate two proclamations from General Riley, one dated December 12th and the other December 20, 1849. Both were addressed to the people of California. In the first General Riley declared the constitution ratified on November 13th, to be ordained and established as the constitution of the state of California, and in the second he resigned his position as civil governor. *Ibid.*, 45.

² *Ibid.*, 65.

the question of revenue was referred to the committee on finance in the Senate on January 3rd.¹ It had been referred to the committee on ways and means in the Assembly, on December 21st.² Before that, however, on December 20th, a resolution was passed by the latter body authorizing the committee on ways and means to report, by bill or otherwise, the most practicable method of raising sufficient revenue for supporting the civil government of the state for one year, and a proper sinking fund for paying the debt which it would be necessary to incur thereby.³ The following day the committee was authorized to confer with General Riley and see whether he had any money which belonged to the state and which he would be willing to turn over to the state authorities.⁴ The Assembly received a communication from the Senate on the 22nd saying that the latter had passed a resolution appointing a committee for a similar purpose.⁵ On the same day, Walthall, chairman of the ways and means committee of the House, reported the result of his conference with General Riley. The latter said that he had neither money nor evidence of debt belonging to the state, but that he had under his control several hundred thousand dollars which he thought belonged to the state, and had written to the proper department at Washington for instructions. As soon as he heard from there he would communicate with the

¹ *Journals of the California Legislature*, 1850, 65.

² *Ibid.*, 608.

³ *Ibid.*, 591.

⁴ *Ibid.*, 595.

⁵ *Ibid.*, 610.

Legislature on the subject.¹ On the 24th of December, Walthall reported a bill authorizing a loan on the faith and credit of the state, which was read a second time and referred back to the committee for further consideration.² A resolution offered on the same day, to permit the various state officials to procure such blank books and stationery as they needed, was lost.³

The Legislature adjourned from December 24th to 28th, but immediately after the Christmas recess Walthall again submitted a report from the committee. The same bill proposing a plan for raising money to meet the immediate needs was offered, "with an amendment, and also a bill for a temporary loan." The latter seems to have been the only one considered. The bill was entitled "an act authorizing a loan of money to pay the immediate demands on the treasury until a permanent fund can be raised for the purpose." The bill passed the first and second reading, during which time one amendment was made and two rejected. It was then laid on the table.⁴ The next day, December 29th, the bill was again brought forward, amended and ordered to be engrossed.⁵ It passed the House December 31st,⁶ and on

¹ *Journals of the California Legislature*, 1850, 612.

² *Ibid.*, 621.

³ *Ibid.*, 622. On February 9th, however, an act was passed for this purpose. It was entitled "an act authorizing the Secretary of State, Comptroller, Treasurer, etc. to rent offices and procure necessary office furniture for their respective offices." See *Statutes of California*, 1850, 56.

⁴ *Ibid.*, 624.

⁵ *Ibid.*, 626-27.

⁶ *Ibid.*, 629.

the same day was read in the Senate.¹ After undergoing slight amendments it passed the second and third readings in that body on January 2, 1850, and was returned to the House for concurrence in the amendments.² It was accepted in its amended form by the House on the same day.³ On January 5th it was reported to be properly enrolled in both Houses,⁴ and on the 7th the committee on enrolled bills reported that it had been presented to the Governor.⁵ Burnett notified the Assembly on the 11th that he had signed it.⁶

The bill is dated January 5th. It provides that the state treasurer shall receive proposals in writing until noon, January 25, 1850, "from any and all persons to loan to this state a sum of money not exceeding \$200,000, for a term not more than twelve nor less than six years, payable at the pleasure of the state any time after six years." In the afternoon of the appointed day, the treasurer was to open the various proposals submitted in the presence of the chairman of the finance committee of the Senate and chairman of the committee on ways and means of the House, and the three were to select from the bids "such one or more as they may deem most reasonable and best calculated to secure said loan," provided all proposals so selected should be placed before the Legislature for their approval. If the Legislature decided to accept any of the proposals, it would be the duty of the

¹ *Journals of the California Legislature*, 1850, 61.

² *Ibid.*, 63.

³ *Ibid.*, 630.

⁴ *Ibid.*, 73 and 638.

⁵ *Ibid.*, 640.

⁶ *Ibid.*, 650.

treasurer of the state to prepare and execute bonds in such form as he might deem proper and for such amounts as might be agreed upon between him and the lenders, in sums not less than \$5000, and "payable to the lender or lenders at the time stipulated by the parties, and bearing such rate as may be contracted for by the parties, and approved of by the Legislature, payable quarter-yearly out of any money in the treasury not otherwise appropriated." The bonds were to be signed by the Governor and countersigned by the treasurer and were to be delivered to the successful bidder of the loan whenever the money so loaned was paid into the treasury. The faith and credit of the state were pledged for the payment of such a loan.¹

Such was California's first bill for raising revenue. On January 26th, Thomas J. Green, representative in the Senate from Sacramento and chairman of the committee on finance,² reported that "in accordance with the loan law of the 5th instance, in company with the chairman of the committee on ways and means of the Assembly and the treasurer, upon examination (he had) found that there were no propositions of loan under said law." He also promised, at an early date, to present a more elaborate report accompanied by a bill for a temporary state loan.³ This he did two days later.

Green's report dealt both with the subject of a temporary

¹ *Statutes of California*, 1850, 458-59.

² Green came from Texas evidently in 1849. (See above pp. 110-11 and note 2.) Bancroft, *History of California*, VI, 315 calls him "the irrepressible senator to whom everything was a huge joke." He "had been elected in a frolic, and thought legislation a comedy."

³ *Journals of the California Legislature*, 1850, 423.

loan and with taxation. In regard to the latter, he believed that a "tariff of taxes" might be imposed which by July, 1850, would produce an income of from \$600,000 to \$700,000. The tax bill had been drawn up in consultation with the ways and means committee of the House, and presented a list of taxable goods large in amount upon which the collection of taxes would be easy. The *ad valorem* principle imposed by the constitution would develop resources such as "no state ever witnessed, and means of payment would be easy because the new state was so rich in resources." He recommended that both the assessment and collection of taxes be made in July, 1850. He also recommended a poll tax of \$5, which would be about one-half the average of the *per diem* value of labor.

For the purpose of creating a fund for the "immediate necessities of the state, to be used before the taxes could be collected in July," he recommended the issue of bonds, not to exceed \$300,000 in amount, bearing an interest of one per cent per month ¹ and payable six months after date, but redeemable at any time there should be money in the treasury or in the hands of a tax collector. In the absence of coin the bonds might be paid to any state creditor who desired them, and the bonds "*shall* be at all times received by the treasurer or any tax collector for any due or demand upon the state." The confidence of the holder in the ability of the state to redeem these bonds, the ease with which they could

¹ Bancroft, *History of California*, VI, 315 says that Green's bill proposed "a loan at ten per cent per annum when the lowest bank rate was five per cent per month."

be carried, and their accumulative character at one per cent per month would, he felt sure, prevent any depreciation in their value.¹

The bill with some modifications passed the Senate by vote of six to five, January 29th,² was accepted in the House on the following day by a majority of nine in a total vote of twenty-seven,³ and was presented to the Governor and signed by him on February 1st.⁴ According to the terms of the bill the treasurer of the state was authorized, as soon as practicable, to issue bonds of the state in sums of \$100, \$225, \$500, and \$1000 payable six months after date at the rate of three per cent interest per month, the total issue not to exceed \$300,000. The bonds were to be signed by the treasurer, endorsed by the governor, and countersigned by the comptroller. They were to be tendered in payment for any debts against the state, providing there was no coin in the treasury. The treasurer was not to pay out the bonds at less than their par value, but was to accept them "for the par value, and all the interest which may have accrued thereon, from all persons, including public collectors, up to the time of the receipt thereof." They were to be dated at the time of issue. "If any collector of the public revenue or state dues, having money in hand sufficient, shall refuse to exchange for such bonds when applied to for that purpose by any bondholder, he shall be fined . . . in a sum not ex-

¹ *Journals of the California Legislature*, 1850, 424-7.

² *Ibid.*, 117.

³ *Ibid.*, 738.

⁴ *Ibid.*, 754 and *Statutes of California*, 1850, 53.

ceeding \$400." ¹ The treasurer, as soon as he had sufficient money in the treasury, was to advertise, "by giving six months' notice in some newspaper, requiring them to be brought in for redemption, and any such bonds which shall not be returned to the treasury in that time shall cease to bear interest." ²

That part of Green's report dealing with taxation apparently did not receive consideration at this time, but the recommendations there made were partially embodied in two other bills brought forward by Tingley of the ways and means committee in the House on January 30th. They were entitled "a bill prescribing the mode of assessing and collecting public revenue," and "a bill defining the amount of revenue to be collected to defray the expenses of the government of the state of California for the year 1850." ³ The latter became a law February 25th; the former was not passed until March 30th.⁴ The act defining the amount of revenue to be collected to defray the expenses of the government of the state for the year 1850 says that "there shall be levied and collected in the manner prescribed by law, the sums of money hereinafter specified, to defray the expenses of the government of the state of California for the year 1850, to wit: on each one hundred dollars' worth of taxable property, fifty cents; and a poll tax of five dollars on every male inhabitant of this state over twenty-one years of age

¹ *Statutes of California*, 1850, 53-54.

² *Ibid.*, 54.

³ *Journals of the California Legislature*, 1850, 736.

⁴ *Statutes of California*, 1850, 54.

and under fifty years, and not exempt from the payment of a poll tax by law.”¹

The statute of March 30th enacted that all real and personal property within the state should be liable to taxation except the following: real and personal property of the United States and of the state; lands sold by the United States until the term of five years from the date of sale; schools and court houses; jails and the land on which such buildings were located, not exceeding ten acres; churches and cemeteries; buildings erected for the use of literary, benevolent, charitable or scientific institutions and tracts of land on which such buildings were situated, not exceeding twenty acres, and the personal property belonging to such institutions; lands granted for the use of common schools, so long as the same shall remain unsold; the personal property and real estate of every manual labor school or college incorporated within the state, when used for the purpose for which it was incorporated, such real estate not to exceed three hundred and twenty acres; and the personal property of widows and orphans to the extent of \$1000. The term *real estate* was defined as including “all lands within this state, and all buildings or other things erected or affixed to the same; and the terms *land* or *real property*” should be “construed as having the same meaning as the term ‘real estate’.” Personal property was “to include all household furniture, goods, chattels and moneys; all ships, steamboats, vessels and water craft of any and every description whatever . . . ; all moneys at interest owing to the person to be taxed more

¹ *Statutes of California*, 1850, 65.

than they pay interest for, and other debts owing to them from solvent persons more than they are indebted for, and all public stock in turnpikes, bridges, insurance companies and monied corporations . . . ; also such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be vested in real estate." Stockholders in corporations were not to be taxed as individuals for such stock. Enlistments for poll tax and for tax on personal estate and lands were to be made in the county where the persons resided who were subject to such taxes. When personal property was mortgaged it was to be considered the property of the person who had possession; in case of mortgage in real estate the mortgager was to be considered the owner until the mortgagee should take possession. Provision was also made for enlisting the individual real estate of deceased persons. The bill further contained directions for making out the assessment roll, directions for determining the value of property, directions for making out lists of taxable property in each county together with various other directions, both general and detailed in character, on assessment, collection and auditing.¹

On the same day (January 29th) that the bill for a temporary state loan was taken from the table where it had been consigned immediately after its first reading, another was brought forward entitled a bill "authorizing a loan on the faith and credit of the state, to pay the expenses of the civil government thereof."² It was considered in the House

¹ *Statutes of California*, 1850, 135-42.

² *Journals of the California Legislature*, 1850, 731.

on January 31st,¹ February 1st and 2nd, and on the 4th was amended and laid on the table.² On the 6th it came up again, and vain attempts were made to amend and finally to table the bill.³ It ultimately passed by a vote of fifteen to fourteen.⁴ It was read in the Senate February 7th, and referred to the committee on finance.⁵ On the 11th the committee reported, recommending numerous amendments.⁶ It was up again on the 13th, 14th⁷ and 16th, when it finally passed, after other amendments were inserted, by a vote of eight to five.⁸ The original bill as reported by the committee in the House had provided for a loan of \$750,000,⁹ but this had been changed in the Senate to \$1,000,000. The loan was to be for twenty years,—subject to payment by the state at any time after ten years, either in full or in part—and was to bear interest not exceeding ten per cent. The bonds to be issued for the payment of the loan were to have certificates for the payment of interest attached to them. Bids were to be received by the treasurer, the same to state the

¹ *Journals of the California Legislature*, 1850, 744.

² *Ibid.*, 754-5; 773.

³ *Ibid.*, 783. In the discussion Ogier of San Joaquin and Watson of San Francisco became involved in a difficulty and were conducted without the bar by order of the speaker. A committee was appointed to report on the case, and recommended that an apology be demanded from each one. Both members apologized and were readmitted to their seats, p. 788.

⁴ *Ibid.*, 784.

⁵ *Ibid.*, 135.

⁶ *Ibid.*, 145-46; 457-58.

⁷ *Ibid.*, 152 and 155.

⁸ *Ibid.*, 161.

⁹ *Ibid.*, 160.

interest on and the amount of the loan. All bids were to be in the hands of the treasurer within twenty days after the date of the bill. No bid was to be received for less than \$10,000. Bonds were not to be issued for less than \$5000, and were to bear interest from the date of issue. "The faith and credit of the state, and all the public lands which may be granted to the state by Congress not heretofore otherwise appropriated, and all public revenues, are hereby pledged to pay the interest punctually and redeem the principal of said loan." ¹

A few other financial measures were passed by the first Legislature, the majority of them explanatory in character or dealing with the management and disbursement of funds. On January 31st was passed an "act prescribing the mode of receiving, keeping, and paying out the public funds," ² which is explained in a general way by its title. An act was passed February 12th, appropriating the sum of \$750,000 out of the general fund to pay the expenses of the government for the fractional fiscal year ending on the last day of June, 1850, and \$250,000 to pay partially the expenses of the half year beginning July 1st.³ Another act passed February 20th entitled "an act concerning the revenue, funds, expenditure and property of the state, and management thereof," ⁴ was supplemented by an explanatory act passed April 18th.⁵ According to the act regulating the rate

¹ *Statutes of California*, 1850, 69-70.

² *Ibid.*, 51.

³ *Ibid.*, 56.

⁴ *Ibid.*, 63.

⁵ *Ibid.*, 459.

of interest on money, passed March 13th, parties might arrange by contract for any rate of interest, but if the amount of interest was not specified in the contract, the rate was to be ten per cent.¹ April 4th there was passed "an act in relation to money or accounts of this state"² and on the 16th another "relating to bills of exchange and promissory notes."³

If these measures appear extravagant it must be remembered that money was plentiful in California at the time, that the members of the first Legislature were young men, and that the environment was such as to create an unexampled state of optimism. Whatever the opinion held, the fact remains that the financial measures passed by the first Legislature proved insufficient to meet the needs of the government during the first year of its existence.⁴

¹ *Statutes of California*, 1850, 92.

² *Ibid.*, 459.

³ *Ibid.*, 247.

⁴ See Bancroft, *History of California*, VI, Chapter 22.

CHAPTER XIV

CIVIL OR COMMON LAW?

VERY naturally the great majority of the people in California in 1849-50 would favor the system of common law and would oppose the adoption of a civil code. They were English and for generations had lived under a modified system of the common law. The lawyers had been trained under this system and doubtless knew little of the civil law. But there was a small minority of the legal profession who had practised law in California while it was a part of the Mexican territory, and were therefore more familiar with the civil law. To them the Governor's message offered encouragement, and especially was this true among the lawyers of San Francisco.

During the period of the first Legislature there were approximately one hundred men practising law in the city of San Francisco. They held two or three meetings after the Governor's message was issued for the purpose of uniting their influence against that part of the message which recommended the adoption of a civil code. Unanimity of action, however, could not be determined upon, and the result was the forwarding of two petitions, the one to the Assembly and the other to the Senate.

The Assembly petition was received by that body on Jan-

uary 30, 1850, and was signed by about eighty of the lawyers of San Francisco. It informed the Assembly that a meeting of the legal profession of San Francisco had been held over which Colonel Mumford had presided and for which John Satterlee had acted as secretary. After full discussion and deliberation the following resolutions had been adopted by a large majority.

“Resolved, That we would respectfully recommend the adoption and establishment, by the Legislature, of the common law of England, as modified by most of the states of the Union, and that we are opposed to the adoption of the civil law, except so far as the same has been engrafted upon the common law, in relation to mercantile and marine jurisprudence, and may be necessary in chancery and admiralty proceedings.

“Resolved, That the Legislature be recommended to adopt the simplest forms of practice and pleadings compatible with the common law system.

“Resolved, That the chairman and secretary be authorized and requested to transmit to the Legislature the resolutions adopted by this meeting; and that the proceedings be published.”¹

On February 1, 1850, Douglass of San Joaquin presented a petition in the Senate signed by John W. Dwinelle and seventeen other lawyers of San Francisco, “praying the Legislature to retain in its substantial elements the system of civil law” as proposed by the Governor, instead of the English common law. The petition was placed in the hands

¹ *Journals of the California Legislature, 1850, 735-36.*

of a committee of the judiciary,¹ and on Wednesday, February 27th, Crosby from the district of Sacramento, chairman of the committee, made a lengthy report.²

He said the committee were of the opinion that the proper settlement of this question was "by far the most grave and serious duty" which the first Legislature would have to perform. In settling it members of that body would be laying the foundation of a system of law which, if adapted to the needs of the people, would probably endure for generations to come.

Two or three meetings of the one hundred lawyers in San Francisco had been held recently, he continued, and the legal profession there had declared almost unanimously in favor of the common law, and had passed resolutions proposing its adoption.³ In fact the eighteen who had signed the petition before the Senate were the only ones who had expressed opinions unfavorable to it. The percentage of those favoring the common law in San Francisco and throughout the state was about the same. In other words about four-fifths of the legal profession in California would favor the adoption of the English common law.

¹ *Journals of the California Legislature*, 1850, 126.

² *Ibid.*, 180 and Appendix O,—p. 459 *et seq.*

³ Brackett, a representative in the Assembly from Sonoma, introduced a resolution in that body on January 26th instructing the committee on the judiciary to report to the House a brief and comprehensive act, substantially enacting that the common law of England and all the statutes and acts of Parliament down to a certain reign, which were of a general nature and not inconsistent with the constitutions of the United States and California, should henceforth be the rule of action and decision in the state of California. *Journals of the California Legislature*, 1850, 723.

The committee did not favor adopting the whole body of either civil or common law. There were in each principles and doctrines, political, civil and criminal, which were repugnant to American feelings and inconsistent with American institutions. In Louisiana, the only state in the Union where the civil law prevailed, and in the other states where the common law was recognized, great and radical additions and alterations had been made in the particular system which each had taken as the foundation of its jurisprudence.

The report then offered a long explanation of both the civil and the common law. Briefly stated, the latter had its origin in England and developed gradually from the blending of the Saxon and Norman customs and laws with "valuable portions of the civil law, modified and enlarged by numerous acts of the English parliament, smoothed in its asperities and moulded into shape by a succession of as learned and wise and sagacious intellects as the world ever saw," softened by religion and English literature and amended by American legislation so as to adapt it to republican principles. The former was a system based upon the crude laws of a rough, fierce people, which received "in its progress through the various stages of civilization from barbarism to luxurious and effeminate refinement, a variety of additions and alterations" from the acts of Roman senates and assemblies, and from the decrees of consuls and tribunes and the edicts of Roman tyrants, until the whole chaotic mass was systematized by Justinian. The civil law was adopted by the various countries of continental Europe except Russia and Turkey, but was rejected by England. The colonies founded

by the countries of continental Europe had accepted the civil law; the English colonies had adopted the common law. It was from the latter that we inherited such institutions as trial by jury and the right of *habeas corpus*; nothing of the kind was to be found in the former. The domestic relation was differently defined in the two systems. The civil law regarded the husband and wife, "connected it is true by the nuptial tie, yet disunited in person, and with dissevered interests in property." The union was regarded as a partnership in mercantile and commercial life. The common law, on the other hand, considered the union of husband and wife so indissoluble in its nature that they became one in person, and, for most purposes, one in estate. Under the civil law man did not attain his majority until he was twenty-five years old, and sometimes he was subject to parental authority for a much longer period; but the common law recognized man as an independent and responsible being after the age of twenty-one. Equally important differences might be noticed in mercantile and commercial life. Under the common law trade was protected and a rapid change of commodities fostered; under the civil law both were restricted.

These differences afforded strong reasons for the adoption of the common instead of the civil law in California, but there were others even more potent in character. More than twenty-nine thirtieths of the immigrants in the state came from that part of the Union where the common law was recognized. More than twenty-nine thirtieths of the business of the state was carried on by men acquainted with

the common law. The large majority of the lawyers and judges of California were familiar with the common law, but knew very little about the civil law. Reference books could be procured easily by those practising if the common law were adopted; this would not be true if the civil law were made the permanent code. The committee therefore recommended that the prayers of the petitioners should not be granted, and requested that they might be discharged from further consideration thereof.

The Senate accepted the report and ordered five hundred copies of the same printed.¹ Following this, April 2nd, Brackett, a representative from the district of Sonoma, introduced in the Assembly a "bill concerning the common law."² After being slightly amended it passed the Assembly on April 4th.³ It was read in the Senate on the 5th of April,⁴ and passed the second and third reading in that body on the 6th and 12th respectively,⁵ receiving the Governor's signature on April 13th.⁶ The act as finally adopted declared that the "common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state."⁷

On April 20th was passed "an act to regulate proceedings

¹ *Journals of the California Legislature*, 1850, 180.

² *Ibid.*, 1111.

³ *Ibid.*, 1123-1124.

⁴ *Ibid.*, 281.

⁵ *Ibid.*, 289 and 323.

⁶ *Ibid.*, 1204-05.

⁷ *Statutes of California*, 1850, 219.

in criminal cases." It is divided into seven parts: the first gives general definitions and provisions; the second relates to the prosecution of public offences; the third, to proceedings for the removal of public officers by impeachment or otherwise; the fourth, to proceedings in criminal actions prosecuted by indictment; the fifth, to proceedings in the court of sessions; the sixth, to special proceedings; and the last, to costs in criminal proceedings.¹

Organizations of Courts

Closely related to the above enactments, although preceding them in time, was the bill organizing a Supreme Court. The act was passed February 14th, 1850, and provided for the organization of a Supreme Court with a chief justice and two associate justices, any two of whom should constitute a quorum. Without the permission of the Legislature, they were not to leave the state for a longer period than thirty days. The first justices were to be chosen by the Legislature; beginning with 1851 they were to be elected by the people at the general elections every second year, and were to hold their office for a term of six years from January 1st next after the election. If occasion required the governor could appoint to fill temporary vacancies.²

¹ *Statutes of California*, 275. The act was slightly amended on the same day. *Ibid.*, 332.

² S. C. Hastings was chosen chief justice at a joint session of the Legislature held December 22, 1849, and Henry A. Lyons and Nathaniel Bennett, associate justices. *Journals of the California Legislature*, 1850, 618-20. Hastings was to hold office for two years from January 1, 1850; Lyons was to

The Supreme Court was to have appellate jurisdiction in all cases where the matter in dispute exceeded \$200; in all cases where the legality of any tax, toll, impost, or municipal fine was in question; and "in all criminal cases amounting to felony, on questions of law alone." The first term of the Supreme Court was to be held in San Francisco on the first Monday in March, 1850, and after that two regular terms each year, on the first Mondays of June and December, were to be held at the seat of government. Each term was to be held for eight weeks, "unless all causes and proceedings ready for hearing shall be sooner disposed of; and may continue until the first day of the next succeeding term." There was to be a clerk of the court—at first appointed by the Legislature, later elected by the people—who was to make an official report to the governor within ten days after the expiration of each term. Such report was to give the number of causes and proceedings on the calendar, the number tried or heard, the number decided, the number remaining undisposed of, and the length of the term. The Supreme Court was given the usual power to reverse, affirm, or modify the decisions of lower courts.¹

On February 28, 1850, was passed "an act to supersede certain courts, and to regulate appeals therefrom to the Supreme Court." This act abolished courts of second instance and courts of third instance which had been organized

hold office for four years, and was to be chief justice the last two; and Bennett was to serve for six years from the same date. *Statutes of California*, 1850, 462.

¹ *Statutes of California*, 1850, 57-58.


upon occupation of the territory by American troops, but retained temporarily the court of the first instance and provided for transferring the business from the abolished courts to the one retained and to the Supreme Court.¹

By an act passed March 16th entitled "an act to organize the district courts of the state of California," nine judicial districts were formed and provision was made for a resident judge in each district. As in the case of the justices of the Supreme Court, the first district judges, according to the constitution, were to be chosen by the Legislature. The act fixed the time for holding courts in the various judicial districts, prescribed the number of terms for each, and limited their jurisdiction.² District courts were to have "original jurisdiction in law and equity in all civil cases, where the amount in dispute exceeds \$200, exclusive of interest; in all

¹ *Statutes of California*, 1850, 77.

² The judicial districts were named according to their respective numbers. The first comprised the counties of San Diego and Los Angeles; the second, Santa Barbara and San Luis Obispo; the third, Branceforte, Santa Clara, Contra Costa, and Monterey; the fourth, San Francisco; the fifth, Colaveras, Tuolumne, San Joaquin, and Mariposa; the sixth, Sacramento and El Dorado; the seventh, Marin, Sonoma, Napa, Solano, and Mendocino; the eighth, Yolo, Sutter, and Yuba; and the ninth, Butte, Colusi, Trinity, and Shasta. *Statutes of California*, 1850, 93.

The judges chosen by the Legislature for the preliminary term of two years as prescribed by the constitution (the regular term from January, 1853, was to be six years) were as follows: for the first district, O. S. Witherby; the second, Henry A. Tefft; for the third, John H. Watson; for the fourth, Levi Parsons; Charles M. Creaner for the fifth; and J. S. Thomas, Robert Hopkins, Wm. R. Turner, and W. Scott Sherwood for the sixth, seventh, eighth, and ninth respectively. *Journals of the California Legislature*, 1850, 1097-1103.



criminal cases not otherwise provided for; and in all issues of fact joined in the probate court; and in all cases involving the title or possession of real property their jurisdiction shall be unlimited." The county clerks were to be *ex officio* clerks of the district courts in and for their respective counties.¹

An act to organize county courts was passed April 13th. The county judges were to hold annually at the county seats of their respective counties four terms, commencing on the third Monday of January, April, July, and October, for the trial of appeals from justices of the peace, and such special cases as were pending therein. Special terms might be held for the transaction of probate business when the county judge considered such special sessions necessary.²

Two days earlier, April 11th, was passed an act to organize the court of sessions in each county. It was to be composed of the county judge who was to preside, and two justices of the peace of the county. The latter were to be styled associate justices, and were to be chosen by the justices of the peace of the county, who were to be called together for that particular purpose by the judge of the county. The court of session was to have jurisdiction throughout the county over all "cases of assault, assault and battery, breach of the peace, riot, affray, and petit larceny, and over all misdemeanors punishable by fine not exceeding \$500, or imprisonment not exceeding three months." Power and jurisdiction in certain other cases were specified, and the

¹ *Statutes of California*, 1850, 93-96.

² *Ibid.*, 217.

terms of the court fixed for the second Monday of the months of February, April, June, August, October, and December of each year.¹

Other related acts passed by the first Legislature were the following: "an act to fix the terms of the superior court of the city of San Francisco" passed April 17th; "an act to regulate proceedings in criminal cases;" and an amendment to the same passed April 20th; "an act defining the time for commencing civil actions," April 22nd; and "an act to abolish all laws now in force in this state, except such as have been passed by the present session of the Legislature," April 22nd;² "an act to regulate proceedings in courts of justices of the peace in civil cases," passed April 10th. A joint resolution³ was passed requiring the appointment of a committee of three from each House to designate what laws of a general character should be immediately published under the act providing for the early publication of laws.⁴ Joint resolutions were also passed classifying the justices of the superior court of the city of San Francisco and the justices of the Supreme Court.⁵

¹ *Statutes of California*, 1850, 210-11.

² *Ibid.*, 179, 257, 275, 332, 343 and 342.

³ *Ibid.*, 465.

⁴ *Ibid.*, 92.

⁵ *Ibid.*, 468 and 462.

CHAPTER XV

LOCAL GOVERNMENT AND OTHER LEGISLATIVE ENACTMENTS

Counties

THE Senate committee on county boundaries was composed of De la Guerra, Green, Bidwell, and Lippincott.¹ On January 4th the committee, through its chairman, De la Guerra, made its first report. A subdivision of the state into eighteen counties was recommended by the committee, and seats of justice were named in all the counties with three exceptions. The committee reported that they had not thought it advisable to form an entire county within the mining districts because of the transitory character of the mining population. Such districts were therefore placed within those counties most accessible, "and with which their trade and communication" were chiefly connected.²

The report was not considered until the seventh when, after some discussion, it was returned to the committee for their reconsideration.³ A few days later, January 16th, the Senate received a petition from one hundred and forty-one citizens of Santa Cruz "protesting against the attach-

¹ *Journals of the California Legislature*, 1850, 28.

² *Ibid.*, 72, 411-19.

³ *Ibid.*, 77.

ing to, or including in, the county of Monterey, the district of Santa Cruz, and praying that a county may be granted to them known and styled as the county of Santa Cruz." The petition was referred to the committee on county boundaries,¹ and influenced the report made by them on January 18th.² There were evidently protests from other places besides Santa Cruz, so that the second report was entirely different from the first. Instead of eighteen, the committee now recommended subdividing the state into twenty-five counties, and in several instances names were changed. San Joaquin county became Calavera; Oro was changed to Tuolumne; Benicia, to Solano; Frémont, to Yolo; and Reading to Shasta. The seven new counties formed were Coloma, Yuba, Coluse, Trinity, Marin, Mendocino and Santa Cruz.³ Among numerous amendments imposed on the bill during its passage through the Senate was one changing the name of Santa Cruz to Branciforte.⁴ The amended bill was returned to the Assembly on January 25th,⁵ but did not receive consideration until four days later.⁶ The House amended, receded from its amendments, and finally passed the bill with a few changes on February 13th, the vote for its adoption being unanimous.⁷ A notice of its passage was sent to the Senate on the 14th, and the next day the amended bill passed

¹ *Journals of the California Legislature*, 1850, 92.

² *Ibid.*, 95.

³ *Ibid.*, 420-21.

⁴ *Ibid.*, 100-101.

⁵ *Ibid.*, 719.

⁶ *Ibid.*, 735.

⁷ *Ibid.*, 849.

that body.¹ It was presented to the Governor and signed by him February 18th.²

In its final form the bill provided for the subdivision of the state into twenty-seven counties. County-seats were designated in all except four. Marin and Mendocino were attached to Sonoma for judicial purposes; Colusi was joined to Butte; and Trinity to Shasta.³ Two bills, passed on April 6th and 18th respectively, changed the boundaries in several instances, and restored the name Santa Cruz, as originally proposed, for that of Branciforte.⁴

On April 16th Vallejo, chairman of a committee appointed January 22nd to report on the "derivation and definition of the names of the several counties of California," gave a report not only explaining the origin and meaning of the names in most cases, but giving a description of the counties and, in some instances, accounts of early explorations, with estimates of the population at that date.⁵

On the 14th of February a bill passed the Assembly providing for holding the first county election.⁶ It was reported in the Senate on the following day, and was passed with some amendments.⁷ The Assembly would not agree to accept the amendments, however.⁸ Committees were appointed

¹ *Journals of the California Legislature*, 1850, 156.

² *Statutes of California*, 1850, 58.

³ *Ibid.*

⁴ *Ibid.*, 155-56 and 262-63.

⁵ *Journals of California Legislature*, 1850, 522-37.

⁶ *Ibid.*, 853.

⁷ *Ibid.*, 157-58.

⁸ *Ibid.*, 871.

from both Houses and the disagreement was soon settled, the Governor signing the bill on March 2nd.¹ This was followed by a supplementary act on March 9th.²

The act of March 2nd required the prefects throughout the state immediately to designate a suitable number of election precincts in each county in their respective districts, and to give proper notice of the same in the respective counties. The prefects were also to give notice of county elections to be held on the first Monday in April for the purpose of electing the following officers: a clerk of the Supreme Court, a district attorney for each judicial district, a county judge, a county clerk, a county attorney, a surveyor, a sheriff, a recorder, an assessor, a coroner, and a treasurer. If county precincts were not properly established by the day indicated, elections might be held at any place where not fewer than thirty electors were present. On the second Monday in April, or one week after the election, the inspectors in each county were to meet at the county-seats of their respective counties as a board of canvassers. Upon determining the results of the election, notices were sent to the successful candidates by the president of the board.³ The bill of March 9th—the supplement of the above—provided that in case the act of March 2nd failed to reach any prefect in time for him to give proper notice of the regular election on the first Monday in April, such prefect should arrange for holding the election within fifteen days after

¹ *Journals of the California Legislature*, 1850, 172, 871, 191.

² *Statutes of California*, 1850, 85.

³ *Ibid.*, 81-83.

the receipt of the notice.¹ County elections, according to the act regulating elections passed on March 23rd, were to be held every two years on the day designated in the act of March 2nd—the first Monday in April. In the act regulating elections, general directions were given also as to the qualifications of electors, places of holding elections, and other things common to enactments similar in character.² The officers elected in April, 1850, were to assume their duties as soon as possible after the election.

Still no provision had been made for organizing a government in Marin, Mendocino, Colusi, and Trinity counties. An act was passed for this purpose on the 18th of April. It provided, in certain cases where county officials were not elected under former enactments, that judges of adjoining counties, providing there were no county judge or county clerk in said county, should order elections in such counties. Officers elected under this act would be considered to have begun their term on the first Monday in April. City officers might be similarly elected at the command of county judges, if such had not been elected at the first election.³ On April 22nd, the last day the Legislature was in session, another act was signed by the Governor declaring Marin county to be organized with San Rafael as the county seat. Those counties that had not completed their organization according to law were to remain under the jurisdiction of the counties

¹ *Statutes of California*, 1850, 85.

² *Ibid.*, 101-11.

³ *Ibid.*, 259-60.

to which they had been attached until such organization was complete.¹

The Incorporation of Cities

The first Legislature incorporated six cities by special acts, and declared three others incorporated under a general law passed March 11th. In the first group were Sacramento, incorporated February 27th; Benicia, San Diego, and San José, March 27th; Monterey, March 30th; and San Francisco, April 15th. In the second group were Sonoma and Los Angeles, incorporated April 4th, and Santa Barbara, on April 9th.² The Senate bill to incorporate Los Angeles had passed both Houses of the Legislature as early as January 28th, but had been vetoed by the Governor, and the Assembly could not muster the necessary two-thirds majority to pass the act over his veto. When the Assembly bill to incorporate Sacramento, however, met the same fate at the hands of the state's chief executive, it was passed by both Houses on the same day. Closely connected with the act to incorporate Sacramento was a general act providing for the incorporation of towns and villages, while the act of March 11th, providing for the incorporation of cities, to which reference has been made, doubtless grew out of the recommendations found in the Governor's message accompanying his veto of the Los Angeles bill and reiterated in the Sacramento veto message. It may be well, therefore, to consider somewhat

¹ *Statutes of California*, 1850, 406.

² The acts of incorporation may be found in *Statutes of California*, 1850.

in detail the incorporation of Sacramento and Los Angeles, and to outline briefly the general laws for incorporating cities and towns.

As early as Thursday, December 20, 1849, Cornwall, a member of the Assembly from Sacramento, gave notice that he would, on the following Monday, offer a bill to incorporate that city.¹ It was read at the appointed time (December 24th) and immediately after the Christmas recess (December 28th) it was brought forward again and referred to the committee on corporations, "with instructions to inquire into the propriety of establishing a general law on the subject of incorporated cities and villages."² The committee's report therefore dealt with the last subject and not with the incorporation of Sacramento. On January 12, 1850, the Sacramento proposal was placed in the hands of a special committee composed of delegates from that district.³ When the committee reported three days later, January 15th, the report and the bill were temporarily tabled.⁴ It was taken from the table on the 19th, read a second time and amended, and on the 21st was passed unanimously.⁵ On the 24th it was amended in the Senate and passed,⁶ and the bill in its amended form was accepted by the Assembly the next day. Nearly a month later, February 21st, the Governor

¹ *Journals of California Legislature*, 1850, 591.

² *Ibid.*, 625-26.

³ *Ibid.*, 652.

⁴ *Ibid.*, 660.

⁵ *Ibid.*, 699 and 701-702.

⁶ *Ibid.*, 109.

returned the bill with his veto.¹ The objections offered were practically the same as those which he had submitted when he vetoed the bill incorporating Los Angeles about three weeks earlier, and as these will be given presently they need not detain us here. On February 27th the bill was passed over the Governor's veto by both Houses—in the Assembly by a vote of sixteen to five, and in the Senate by nine to two.² The provisions for government laid down in the bill were practically the same as those enacted under the general law of March 18th.³

A bill was introduced in the Senate by Hoppe on January 14th to incorporate Los Angeles.⁴ On the 15th it was read a second time and laid on the table.⁵ The next day it was taken from the table and referred to the committee on corporations, and the committee reported on the 22nd.⁶ "The city of Los Angeles already has a charter or grant from the former government," they believed, "which gives the inhabitants of that place, to a certain extent, the rights and privileges of a municipality." They further reported the extent of lands claimed by said city, "according to verbal information obtained," to be four square Spanish leagues. The old charter, if there had ever been one, was not accessible, however, and if it were, the committee doubted whether

¹ *Journals of California Legislature*, 1850, 890.

² *Ibid.*, 183 and 914.

³ The bill will be found in the *Statutes of California*, 1850, 70-74. It is there dated March 11th.

⁴ *Journals of California Legislature*, 1850, 87.

⁵ *Ibid.*, 91.

⁶ *Ibid.*, 93, 103-104.

there was any tribunal in the country that could adjudicate its merits. Furthermore they were of the opinion "that no law passed by this Legislature can affect any right or privilege claimed by any town or city under a written grant or charter from the former government." They therefore recommended the passage of the bill with certain amendments.¹

The committee's report was accepted by the Senate and the bill was sent to the Assembly. Further amendments were introduced there and these were accepted by the Senate on the 28th.² On the 31st the bill was presented to the Governor for his signature.³

But the advocates of the bill were doomed to disappointment. On February 8th it was returned to the Senate with the Governor's veto. He offered two reasons for opposing it: it was a special act to incorporate a city, and it was unconstitutional. He recommended the passage of some general act for the incorporation of cities. Such an act should provide for two classes: cities upon navigable waters, and inland cities. Two kinds of general provisions could be embodied in one bill which would provide for the incorporation of both classes. If this were done, the Legislature would not have to pass special acts of incorporation so frequently.

The second objection, however, was more serious than the first. The act as passed was a direct violation of the thirty-seventh section of the fourth article of the constitution,

¹ *Journals of California Legislature*, 1850, 538.

² *Ibid.*, 112, 114.

³ *Ibid.*, 126.

which said "it shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money" etc. The bill submitted granted "unlimited powers of taxation under a *condition*, not a *restriction*; and thus defeats the end and object of the constitution." ¹

Five days later, February 13th, the Senate passed the bill over the Governor's veto by a unanimous vote.² On the 14th it was sent to the Assembly with the Governor's message,³ where it failed to pass with the necessary two-thirds majority—the vote being fourteen in favor to eleven against.⁴ It was reconsidered the next day, and a second time failed to pass, the vote being sixteen in favor of passing to twelve against.⁵ A notice was then sent to the Senate that the bill had not been accepted by two-thirds of that body,⁶ and on March 6th Hydenfeldt, a member of the Senate from San Francisco, gave notice that he would again at the expiration of five days introduce a bill to charter Los Angeles.⁷ This was done on the 13th, and the bill passed by a vote of ten to none. It was sent to the Assembly and referred to the committee on corporations.⁸ On the 25th it passed the Assembly with amendments,⁹ and on the 27th was returned to

¹ *Journals of California Legislature*, 1850, 137-41.

² *Ibid.*, 151-52.

³ *Ibid.*, 854.

⁴ *Ibid.*, 855.

⁵ *Ibid.*, 857-58.

⁶ *Ibid.*, 167.

⁷ *Ibid.*, 199.

⁸ *Ibid.*, 1010 and 1013.

⁹ *Ibid.*, 1073.

the Senate.¹ The amendment was accepted by the Senate, and on April 4th the bill was signed by the Governor.²

As passed the bill declared the city to be "incorporated according to the provisions of the act entitled 'An act to provide for the incorporation of cities' approved March 18th." Boundaries were named, the number of councilmen fixed at seven, and the rights of the corporation declared to be all those exercised by the city under Mexican rule.³

The general act under which Los Angeles was finally incorporated probably grew out of the Governor's recommendations accompanying his veto of the Los Angeles bill, as already indicated. It was introduced in the Assembly the day after (February 15th) the Governor's veto message was received by that body,⁴ and was brought forward by a man—Crittenden, a representative from Los Angeles—who had voted against passing the Los Angeles bill over the Governor's veto.⁵ On the 19th it passed the Assembly by a vote of eighteen to two, and on the same day was sent to the Senate with the notice that the Assembly had been unable to pass the Los Angeles bill over the Governor's veto.⁶ The bill providing for a general act to incorporate cities was referred to the committee on corporations, and on February 27th, Bidwell, chairman of the committee, reported the bill without amendments and recommended that it be

¹ *Journals of California Legislature*, 1850, 250.

² *Ibid.*, 282.

³ *Statutes of California*, 1850, 155.

⁴ *Journals of California Legislature*, 1850, 855, 857.

⁵ *Ibid.*

⁶ *Ibid.*, 167.

"speedily passed."¹ It was amended somewhat in the committee of the whole in the Senate and passed March 1st.² The amended bill was referred to the committee on corporations in the Assembly March 4th, and the first of the amendments proposed by the Senate, slightly changed.³ The Senate accepted the amendment to their amendment March 5th by a vote of seven to three.⁴ On the 16th the bill was presented to the Governor,⁵ and was signed by him two days later.⁶ As already indicated, it is dated March 11th in the *Statutes of California* for 1850. The dates given in the journals of the Senate and Assembly, together with the reference in the Los Angeles bill already cited, indicate clearly that it should be dated March 18th.

As finally adopted the bill provided that any city having a population of more than two thousand might be incorporated upon application, either by the Legislature or by the court of the county in which it was located. Special acts of incorporation were to define boundaries and declare cities incorporated under this act, "with such changes as may be specially named." A town or village desiring incorporation should present a petition signed by the majority of the electors in the town to the county court, setting forth the boundaries of the town and asking to be incorporated under the act of March 18th. If the court were satisfied that the

¹ *Journals of California Legislature*, 1850, 181.

² *Ibid.*, 190.

³ *Ibid.*, 944, 945-46.

⁴ *Ibid.*, 196-97.

⁵ *Ibid.*, 226.

⁶ *Ibid.*, 229 and 1026.

population exceeded two thousand and that a majority of the qualified electors had signed the petition, the court would declare the town incorporated as a city. In no case was a city to have more than four square miles of territory. All incorporated cities were to be governed by a mayor, a recorder and a common council consisting of not more than twenty nor fewer than seven members, a city marshal, a city attorney, an assessor, and a treasurer. The number of councilmen to be elected at the first election was to be determined by the Legislature or by the county court. A residence of thirty days in the city was required both to hold office and to vote. The duties of the various officials were given at some length, and provision was made for the city council to create other offices when necessary. The direct taxes imposed by the city council were not to exceed "two per centum of the valuation of property within the city."¹

It will be remembered that the bill brought forward in the Assembly December 28th on the incorporation of Sacramento was referred to the committee on corporations with instructions to inquire into the advisability of establishing a general law on the subject of incorporated cities and villages.² The committee's report did not recommend the adoption of a single general law for the incorporation of all cities and towns, but rather discouraged the enactment of such a bill. They did submit a bill, however, which they believed would "afford to almost all the villages and towns

¹ *Statutes of California*, 1850, 87-91.

² See above pp. 298 and 299.

of the state a charter suited to their circumstances.”¹ The committee’s report was accepted, and from their recommendation came the “act to provide for the incorporation of towns” passed March 27th.

Under this act any town or village with a population of two hundred or more might be incorporated by the county court of the county in which the town was situated when the majority of the electors of the town petitioned for such incorporation. Those towns desiring incorporation before the organization of county courts should send petitions to the governor, who was given authority to act on such petitions. In no case was the area of a town to include more than three square miles. The corporate powers of all such towns were to be vested in a board of trustees to consist of five members who were to be elected on the first Monday in May of each year. A detailed account of the duties and responsibilities of the board is outlined in the bill.² They were to be similar to those of the city council: that is the board was to constitute the legislative department of the town government. With the trustees were to be elected a treasurer, an assessor, and a marshal, the last named to serve also as a tax collector. The board of trustees was to provide for other offices when necessary. Any town might be discontinued upon the petition of three-fourths of the legal voters of such town. Like incorporated cities, such towns could sue and were subject to be sued in all courts.

¹ *Journals of California Legislature*, 1850, 643-44.

² *Statutes of California*, 1850, 128-31.

Other Acts Passed by the Legislature

While those already considered were the most important acts passed by the first Legislature dealing with the establishment of state government, they by no means constituted the entire work of that body. Many others pertaining to various subjects were enacted. An act providing for the appointment of pilots for the different ports and harbors of San Francisco; an act creating the office of state printer and defining his duties; an act providing for the safe keeping of the public records; acts affecting the purchase of all necessary furniture, the rental of rooms for different state officials, and the erection of court houses in the different counties; an act to regulate elections; acts governing corporations and authorizing the formation of limited partnerships; an act for the creation of marine hospitals; an act defining the duties of the state librarian and prescribing rules for the government of a state library; acts providing for the organization of militia, for the inspection of steam-boats, for the upkeep of roads and highways, for the incorporation of colleges, to take the sense of the people on the permanent location of the seat of government,¹—these and many others. In all one hundred and forty-six acts and nineteen joint resolu-

¹ *Statutes of California*, 1850.

A permanent capital was not provided until 1854 (Bancroft, *History of California*, VI, 321-325). The inadequate facilities provided for the accommodation of the first Legislature by the citizens of San José led to an early agitation in favor of providing a permanent seat of government elsewhere. As early as December 21st, Woodworth gave notice that he, on the following day or at some future time, would introduce a bill to provide for the removal of the capital to Monterey. (*Journals of California Legislature*, 1850, 29.) The subject did not assume definite form until April 3,

tions passed the two Houses and were signed by the Governor between December 15, 1849 and April 22, 1850. The number and character of these in themselves afford adequate testimony of the high ability, sincere earnestness, and faithful industry of the members of California's first Legislature.

1850. On that day Broderick, from the committee on public buildings and grounds, presented a bill entitled "an act to take the sense of the people of California upon the subject of the permanent location of the seat of government." It was accompanied by a "memorial" from Vallejo and by propositions from the citizens of San José, Monterey, and San Francisco. (*Ibid.*, 268.) Vallejo proposed, if the Legislature would establish the Capitol on land which he owned "upon the straits of Carquines and Napa river," to lay out a city to be called "Eureka or such other name as the Legislature might suggest." Further, he would give to the state, as soon as the Legislature accepted his offer, fourteen different sections of land to be used for various state buildings and institutions, the total grant amounting to one hundred and fifty-six acres. In addition he would give twenty-two different sums of money to be used for as many different specified purposes, and ranging in amount from \$3000 to \$125,000, the total being \$370,000. San Francisco offered buildings and grounds such as the Legislature might select, providing the whole did not cost more than \$100,000. Various citizens of San José offered several tracts of land aggregating several hundred acres, and the municipal authorities of Monterey made an offer of the building used by the Constitutional Convention together with all necessary land for erecting public buildings. The committee recommended the acceptance of Vallejo's proposal. (*Ibid.*, 498-510.)

Vallejo's offer was accepted by the people also, and the second Legislature met at Vallejo, but adjourned to San José after a few days because of the remoteness and lack of hotel accommodations in the former place. A little later a bill was passed making Vallejo the permanent seat of government and the third Legislature assembled there. After a few months, however, they removed to Sacramento "to procure such accommodations as were indispensably necessary for the proper discharge of their legislative duties." On June 1, 1852, the capital was again removed to Vallejo. In 1853 an act was passed making Benicia the capital. The fifth Legislature met there in 1854, and in February of that year again located at Sacramento. Here it has remained. The judiciary, however, fought the matter for more than a year before it finally yielded. (Bancroft, *History of California*, VI, 321-25.)

CHAPTER XVI

THE LAND QUESTION

To enact statutes providing for the incorporation of cities and towns was easy, but to put such laws into operation, in some instances, was more difficult. This was due to the insecurity of the land titles in some of the cities. It would be out of place here to attempt to give even a general account of land disputes. A settlement of the various claims which arose was not made until several years after the state government was put into operation. A very brief summary of the origin of these disputes may be of value, however, in order that the reader may understand something of this important problem which awaited solution.

Spanish and Mexican Grants

Under Spain and Mexico it was not difficult for citizens to obtain land grants. It may be remembered that the Spanish occupation of 1769 was a colonization scheme, the presidio being a temporary device to protect settlers, and the mission, an expedient to prepare the natives to become settlers and citizens. Ultimately California was to be a country of towns and farms occupied by the descendants of soldiers, civilized Indians, and settlers from various foreign countries. Three pueblos were founded and naturally the

first land grants were in the form of town lots. The governors probably had power to grant ranchos after 1786, but no grants were made until after 1800. A few farms were occupied under licenses before the latter date, and about twelve more were taken up between 1800 and 1822. "From the advent of Governor Figueroa in 1833," says Bancroft, "under the Mexican colonization law of 1824 and the *reglamento* of 1828, land grants numbered on an average fifty-three each year to 1846, when the total number was nearly eight hundred." ¹

Under Mexican regulations any citizen, whether native or naturalized, might take up unoccupied land and apply to the governor for a grant. Usually such an application was accompanied by a rude map and was submitted by the governor to the prefect, alcalde, or some other local official for investigation. If the local officer found the land unclaimed, and no objections were raised by citizens, he reported accordingly to the governor. The latter then approved the grant, and the secretary of state made out a duplicate copy which was kept on file in the *toma de razon* or record book. The grant was not valid, however, until approved by the assembly, or if they refused, by the government of Mexico. After approval the grantee presented his *titulo* to the alcalde, who put him in formal possession. Not more than eleven square leagues could be granted to one man or one family unless an agreement was made to estab-

¹ Bancroft, *History of California*, VI, 529-30. These figures were taken by the author from Hoffman's Reports of 1862, which, he says, are only approximately correct. See note 2 on p. 530.

lish a colony.¹ Most of the grants made were from one to five leagues.

But lands were cheap and plentiful, and the people and officials indolent and careless, so that in few if any cases were all of these formalities observed. The important point with petitioners was to get a *titulo* and settle on the rancho. Such quarrels and litigations as came up were usually over boundaries and were generally settled by arbitration. Sometimes there was no *diseno* or map, no *informe* or report of local officials, no approval by the assembly. Few cases were submitted to the national government. Frequently

¹ Grants made to establish foreign colonies were to be at least ten leagues from the coast and twenty leagues from the frontier. No grants were made for this purpose, however, except the McNamara grant of 1846. Bancroft, *History of California*, VI, 531, note.

An official account of Mexican procedure in issuing land grants is given in Jones (William Carey), *Report on the Subject of Land Titles in California*, Washington, 1850, pp. 4-5. He was sent out by the department at Washington in the summer of 1849 as "confidential agent of the government, to proceed to Mexico and California for the purpose of procuring information as to the condition of land titles in California." (*Ibid.*, 3.) He sailed from New York on July 17th, and reached Monterey September 19th following. From that date until December 7th, he remained in California. His report is dated March 9, 1850, and includes, in addition to his information on land titles, the following in the order named: "Articles VIII and IX from the treaty of February 2, 1848; Mexican colonization laws and rules taken from an 'Act of the Mexican government, 4th January, 1823'; 'Decree of the Mexican Congress, of 18th August, 1824, on colonization'; 'Government regulations for the colonization of territories, pursuant to the preceding law, adopted 21st November, 1828'; 'Decree of November 4th, 1833'; 'Decree of Spanish Cortes of January 4th, 1813'; 'Acts governing the early settlement of California'; 'Extract from the Regulation and Instruction for Presidios of the peninsula of California, etc. 1779 and 1781';" together with a few other documents on California missions, etc.

there was no survey of the claim at all; never an accurate one. The grant was for so many leagues, usually at a place indicated by name; "or a certain area more or less between defined natural boundaries; or a fixed extent to be located within certain larger bounds, the surplus being reserved." In brief, the Spanish provisions for land grants were excellently outlined on paper, but they also had the equally common Spanish characteristic of being poorly executed under the Spanish régime. Although the irregularities were frequently deplored in the official communications of the time, "even to the extent of declaring the titles technically illegal, it seems clear that under Mexican law and usage they were practically held as valid; that is, that under continued Mexican rule the governor's written concessions duly recorded in the archives, not invalidated by regrant after abandonment or by direct act of the supreme government, would always have been respected as perfect titles of ownership." ¹

The Alvarado Grant

One of the best known of these early grants was made to Sutter by Governor Alvarado in 1841. This grant of eleven leagues in the Sacramento valley was to include Sutter's "establishment at New Helvetia." The southern boundary was expressly stated as latitude 38 degrees, 41 minutes, 32 seconds.² This would place the southern boundary some

¹ Bancroft, *History of California*, VI, 533.

² See the article by Royce in the *Overland Monthly* for September, 1885, pp. 229, 232 and 233, on the Squatter Riot of 1850 in Sacramento.

miles north of Sacramento, crossing the river of that name not far above its junction with the Feather river, and obviously could not include Sutter's establishment at New Helvetia, which was south of Sacramento city. The northern boundary as indicated by the line of latitude was similarly impossible when compared with the natural land marks—Sutter's Buttes or the *Tres Picos*, mentioned in the grant.¹ Sutter supposed himself to be entitled to more land by virtue of promises made to him by Governor Micheltorena in 1845, although no valid grant whatever was made by that official.²

When the gold-seekers began to come in 1848, "Sutter began to lose his wits. He was later accused of signing any paper that was brought to him. At all events, he behaved in as unbusinesslike a fashion as could well be expected, and the result was that when his affairs came in later years to more complete settlement, it was found that he had deeded away, not merely more land than he actually owned, but, if I mistake not, more land than even he himself had supposed himself to own."³

Whether these charges made against Sutter were true or not, the confusion of boundaries stated in his grant afforded sufficient grounds for certain classes of idlers and frontiersmen to build up cases against him. Some of the radicals claimed that Mexican grants were invalidated by the conquest. The country had just been conquered from Mexico

¹ Royce in *Overland Monthly* for September, 1885, 232 and 233.

² *Ibid.*, 227.

³ *Ibid.*

and was therefore public property.¹ They accordingly began to put their theories into practical operation by "squatting" upon land held by the speculators. They even combined into a "Settlers' Association," employed a surveyor, and issued to their members "squatter-titles."² Such action could lead to but one of two things: either the speculators would have to recognize the squatter claims, or resist them. The Sacramento squatter riot of 1850 was the result.³

Legislative Enactment

This came, however, after the first state Legislature had adjourned. On the last day of the session, April 22nd, that body passed an "act concerning forcible entries and unlawful detainers." It required that entries into lands, tenements, or other possessions should be made by law only. Forcible entries were to be inquired into by justices of the peace and, if necessary, restitution was to be insisted upon. A jury trial might be demanded by either party, but if no such demand were made the dispute was to be settled by the justice of the peace. The complainant on trial "shall only be required to show, in addition to forcible entry or detainer complained of, that he was peaceably in actual possession at the time of a forcible entry, or was entitled

¹ Royce in *Overland Monthly* for September, 1885, 234.

² *Ibid.*, 234-35.

³ *Ibid.*, 225-46. This is probably the best account of the squatter riot in Sacramento. A somewhat briefer treatment is given by the same author in his *California*, Ch. VI, also in Bancroft, *History of California*, VI, 329, note 25. See references given there for further accounts.

to the possession of the premises at the time of a forcible holding over. The defendant may show in his defence that he, or his ancestors, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of one whole year together next before the said inquisition, and that his interest therein is not then ended or determined, and such showing shall be a bar to the prosecution, and in no case when the title of the land is necessarily involved, shall a justice of the peace have cognisance." The defendant was to be subject to a maximum fine of one hundred dollars and cost. On a verdict for the complainant, damages for waste, etc., were to be assessed, and the rent was to be ascertained and trebled for the period during which the defendant had held the property.¹

This act, it is evident, was intended to meet the case of the naked trespasser who took possession of the land without pretence of title.² The squatters declared that it was passed solely to protect Sutter.³ In fact it was asserted that the legislators and judges were not only anti-squatter in sentiment, but even withdrew state support when the squatter attempted to appeal to the federal courts.⁴ This was due to a case brought up in the county court during the second week of August, 1850, under the "act concerning forcible entries and unlawful detainers." ⁵

¹ *California Statutes*, 1850, 425-28.

² *Overland* for September, 1885, 238.

³ Bancroft, *History of California*, VI, 333, note.

⁴ Quoted in *Ibid.* from the *Settlers' and Miners' Tribune*.

⁵ *Overland Monthly*, September, 1885, 239.

Judge Willis, after peremptorily deciding the case against the squatters, declared informally to the attorneys "that it was not clear to him whether the act in question or any other law permitted appeal from the county court's decision in a case like this. He took the matter under advisement."¹ The remark was made in reply to a question put to him by the squatter attorneys in regard to a stay of proceedings just after he had rendered his decision pending an appeal to the state Supreme Court.² The squatters present rushed from the court room and spread the news that Judge Willis had decided against them and had declared that no appeal from his decision was possible.³ Under the leadership of Doctor Charles Robinson, the future free-soil governor of Kansas, they appealed to the higher law, and precipitated the squatter riot already mentioned.

United States and Land Titles

The laws of civilization required the United States to recognize existing land titles in California, and later the obligation was made more binding by the treaty of 1848.⁴ During the period of the interregnum the governors had assured property owners that all rights would be preserved, and they had permitted the distribution of town lots under municipal authorities, but suspended grants of new ranchos.

¹ *Overland Monthly*, September, 1885, 240.

² *Ibid.*

³ *Ibid.*

⁴ See articles VIII and IX of the treaty of Guadalupe Hidalgo.

They refused to settle the numerous boundary disputes which naturally came up, but urged the claimants to await the action of the national government.¹

Bills were reported in Congress in July, 1848 and in January, 1849 which provided for quieting land titles in California and New Mexico, but they failed to pass. The matter came up again in September, 1850 after reports on the land situation had been received from Halleck and Jones, and on March 3, 1851, a bill was passed.² This provided for a board of three commissioners with a secretary and an agent skilled in law and in the Spanish language. This board was appointed by the president for a term of three years, and held sessions at places named by him. Each claimant under

¹ For the attitude taken by Mason in some of the land questions which came up see *California Message and Correspondence*, 1850, 435, 436, 438, 440, 453, 458.

² This act may be found in Minot, *Public Laws of the United States*, 2nd session, 31st Cong., 631-34; also published in pamphlet form with *Treaty Stipulations between the United States and Mexico and Instructions to the Commissioners*, San Francisco, 1852. See also Bancroft, *History of California*, VI, 537-38, 540 *et seq.* Halleck's *Report on Land Titles in California* is in the *United States Government Documents*, 1st sess., 31st. Cong., H. Ex. 17, pp. 118-82. It was sent by Governor Mason to the adjutant general at Washington on April 13th, and is dated March 1, 1849. It was devoted to three topics: (1) laws and regulations for granting public lands; (2) mission lands; (3) lands likely to be needed by the United States government for fortifications. The author's conclusions were, among others, that no grant within ten leagues of the coast was valid; that none was valid without the approval of the assembly or the government of Mexico; that many grants existed which had been antedated; that mission lands belonged to the government unless they had been legally sold; and that coast lands granted by order of Mexico did not include bay islands.

Jones's report made later has been noticed already. He made use of the work done by Halleck in collecting his information.

a Spanish or Mexican title had to present his claim to the board with all evidence on which it was based, within two years. A prompt decision on the validity of the claim was one of the board's most important duties, and to accomplish this its members were authorized to administer oaths and take testimony. Appeals might be made by either party to the district court, and from there to the Supreme Court. The tribunals in all cases were to be governed "by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." Those towns to which grants had been made or which were standing on lands granted to individuals were to have their claims presented by the municipal authorities or by the original grantee.¹

¹ A concise account of these early land titles may be found in Bancroft, *History of California*, VI, Ch. 20. A summary of the act of 1851 and the claims which came before it are given on pp. 540-45 and notes.

CHAPTER XVII

THE SECTIONAL CHARACTER OF THE FIRST LEGISLATURE

It will be remembered that the question of excluding free negroes from California produced considerable discussion in the Convention.¹ The subject was revived by the first Legislature. Just how much Governor Burnett was responsible for the movement would be difficult to determine. We have seen that he urgently opposed their admission in his first annual message, and he is reported to have been most hostile in his attitude toward the race whether slave or free.² He had been instrumental in inserting an anti-negro admission clause in the constitution of Oregon in 1844,³ and the failure of California's first Legislature to pass a prohibitive act was not in compliance with his expressed desire. The attempt to pass such an act may or may not have been the result of his recommendation, but assuredly those favoring such an enactment received encouragement from his message.

I—The Attempt to Exclude

On Saturday, January 26th, a member of the Assembly from Sacramento gave notice that he would introduce a bill

¹ See Chapter VI above.

² Bancroft, *History of California*, VI, 312-13.

³ *Ibid.*

on the following Monday proposing the exclusion of free negroes, mulatto servants, and slaves.¹ It was brought forward on the appointed day, but was immediately rejected on a motion from Randolph, a native of Virginia and a representative from San Francisco. The vote was a close one, thirteen to twelve, the speaker voting in favor of rejection.² Of the thirteen votes favoring rejection, seven were cast by men from northern states, three by men from southern, one by a foreigner, and two by men whose nativity the writer has been unable to learn. Five northerners, six southerners, and one, nativity unknown, voted against rejection. San Francisco cast its three votes in favor of rejection; Sacramento cast three in favor and four against the measure; San Joaquin, one in favor and five against; San José, one for and one against; Sonoma and Monterey, the same; Los Angeles, Santa Barbara, and San Luis Obispo each cast its single vote in favor of rejection. In other words San Francisco, Los Angeles, Santa Barbara, and San Luis Obispo were unanimous in their opposition to a bill which would exclude free negroes; San José, Monterey, and Sonoma were equally divided on the subject, each casting one vote in favor of and one against rejecting the bill; while Sacramento and San Joaquin each furnished three and one respectively in favor of rejection, and four and five respectively against rejecting the same. The mining districts thus contributed nine of the twelve who voted against rejecting a bill to exclude free negroes. It will thus be seen

¹ *Journals of California Legislature*, 1850, 723.

² *Ibid.*, 729.

that the feeling in the first Legislature at this time indicates the same division between the mining districts and the other parts of the state that existed in the constitutional Convention. Of the eleven northern votes cast, six were for and five against the rejection of the bill; while the eight southerners whose nativities are known voted two for and six against it,¹ thus showing a lack of sectional feeling on the subject so far as the Old North and the Old South were concerned.

On April 15th, Ogier, a South-Carolinian and a representative from San Joaquin, brought forward another bill "to prevent the immigration of free negroes and persons of color into this state." It was read a first and second time and referred back to the committee on the judiciary.² The next day it passed the Assembly by a vote of eighteen to seven.³

The vote analyzed above was on the rejection of the bill, while this vote was on the passage of a similar bill. In favor of enacting a law against the immigration of free negroes or persons of color were seven northerners, six southerners, one foreigner, and four whose nativities are unknown; while five northerners, one southerner, and one of unknown nativity voted against the bill. San Francisco voted one in favor of the bill and four against it; San José, three in favor and none against; Santa Barbara one in favor of passage; Monterey, one against; Sonoma, one for and one against; Sacramento, one for and one against; San Joaquin, seven

¹ See above p. 258, note 5.

² *Journals of California Legislature*, 1850, 1223.

³ *Ibid.*, 1233.

for and one against the bill. Stowell of San Francisco had voted in favor of rejecting the first bill, but declared himself in favor of passing the second. Aram of San José, who had formerly voted in favor of rejection, now came out in favor of the second bill. Covarrubias of Santa Barbara made a similar change. The delegates of Monterey and Sonoma assumed the same attitude in regard to the second bill that they had taken toward the first. Tefft of San Luis Obispo did not vote in the second instance. San Joaquin cast eight votes on the second bill against six on the first, but only one of her delegates on each occasion indicated an attitude favoring the admission of free negroes. Only five of the Sacramento delegates voted on the second bill against seven on the first, but the same number (four) in both cases expressed themselves against admitting free negroes. In other words, the representatives from the mining districts held firm and won over to their side one delegate from San Francisco, two from San José (there had been only two delegates present in the first instance but the whole number, three, were present in the second), and one from Santa Barbara. The same lack of sectionalism in so far as the Old North and the Old South were concerned was apparent in the second instance as it was in the first.

The bill was sent to the Senate on the same day it passed the Assembly, April 16th.¹ On the following day, Wednesday (the Legislature adjourned the following Monday), Broderick of San Francisco moved to postpone the free negro bill indefinitely. The motion was carried by a vote of eight to

¹ *Journals of California Legislature*, 1850, 337.

five.¹ Of the eight votes cast in favor of indefinite postponement, five were by men from northern states, two were by natives, and one was by a southerner. All five of the delegates voting against postponement were from southern states. Among these was Thomas Jefferson Green of Texas fame. San Francisco voted one in favor and one against postponement, San José cast its single vote against; Sonoma, Santa Barbara, and San Diego each voted on the affirmative; Sacramento gave one vote to the affirmative and one to the negative; and San Joaquin, two to the affirmative and one to the negative. In other words the six votes cast by the mining districts were equally divided on the subject. Broderick and Hydenfeldt from San Francisco had also voted, the former for postponement, the latter against. San José took the same attitude in the Senate that it had taken on the second bill in the Assembly—*i. e.*, it voted against postponement.

Briefly, three of the five votes cast against indefinite postponement were by men from the mining districts; five of the eight votes favoring such action were from regions outside of the mining districts. Two members from the mining districts—Vermeule from San Joaquin and Bidwell from Sacramento—were not present when the votes were cast. It must also be remembered that the total representation in the Senate from the mining districts just equalled that from the other districts in California. Despite the absence of two members from the mining region, the majority of the votes cast against indefinite postponement were cast by men

¹ *Journals of California Legislature*, 1850, 347.

from that section; while the majority of the votes on the opposite side were cast by delegates outside of the mining sections. That there was a distinct rivalry between the mining and other districts on the free negro question, therefore, seems to be indisputable. There can also be little doubt that this was due to the fact that the miners objected to working side by side with the negroes.

II—The Failure of Old Line Sectionalism

Some time before the adjournment of the Legislature, "an address by the people of California to the citizens of the United States on the application of California for admission into the Union" was drawn up by a committee of three from each House. In view of the content of the address, an analysis of the committee will be interesting.

The three Senate members were Douglass and Fair from San Joaquin district and Hydenfeldt of San Francisco, natives respectively of Tennessee, Virginia, and South Carolina. The Assembly representatives were Baldwin and Shepherd of San Joaquin (Baldwin was from Alabama, and the nativity of Shepherd I have not found); and Walthall of Sacramento, a native of Virginia. Five of the six were thus from southern states and the nativity of one is unknown. Five also were from the mining districts and one from San Francisco.

The Address

The committee spoke in the name of the people of California, and requested an audience "such as *Americans* may

ask and *Americans* will give." Regrets were expressed "that the agitation" which prevailed in the country was attributed to the application of California for admission into the Union. "The occasion," the committee asserted, "has been used to excite your minds to a degree which directs all true patriots, and, indeed, all genuine friends of liberty throughout the world, to look to the hazards and jeopardy of the Union, and to reproach in their very souls the bad spirits that conspire its ruin." Their highest boast, they declared, was allegiance to the Union, "and a right to an equal participation in the glory and constitution of our country."

Continuing, the committee declared that California seemed to experience less favor from the United States than from other nations; "for, while our golden valleys and mountains are exciting universal wonder, and attracting the bold and hardy from every quarter of the globe, and our institutions, modeled after the *American* structure, are calling forth the admiration of the nations of the earth—*its* people congregated here from every part of the Union—*Americans*, all, are made the subject of bitterest debate and most reckless legislation in the halls of Congress. This ought not to be so. They who have employed their time in this way could have served their country far better, we humbly believe, had they been engaged in the enactment of a law uniform in operation, prohibiting, under the penalties of high crimes and misdemeanors, all persons from creating the unholy excitement that menaces the Union."

As citizens of California they claimed all the privileges

and benefits of American citizenship, and whatever evils should result to the United States or to any portion thereof from the agitation of the slavery question would not be the work of their hands. "We repel the charge, or the suspicion of any and all participation on our part in the schemes now in agitation, affecting the integrity of the Union, planned, continued, and advocated, as we believe, by vehement partisans, and often, we grieve to add, by bad men and silly fanatics, who appear to us not to feel the impulse of pure patriotism, and to be incapable of rising in sentiment to the dignity of honest devotion to the Union."

They asserted their claim to admission into the Union as a state because California was thoroughly ripe for admission and had conformed to all the requirements of the constitution. Any act that any free people could do, they could do. Even under the construction that California was a territory and not a state of the Union, they declared that Congress had no power to exercise jurisdiction or authority over them. They had been American citizens in the states from which they emigrated; they remained citizens after coming to California. They repudiated "the dogma that mere change of residence from one part of the Union to another vitiates or impairs our claims to the political privileges and benefits conferred by the constitution upon all citizens equally."

They asserted (1) that the government of the United States was a government of limited powers; (2) that even the powers granted to Congress by the constitution could not be exercised arbitrarily; (3) that Congress had no power

to interfere with the domestic institutions of any state; and (4) that interference on the part of Congress with the domestic institutions of a territory, after the people thereof had framed a constitution and afterwards adopted the same, was unauthorized by the constitution, was "wrong in itself, dangerous in tendency, and destructive of the inherent rights of a people to establish and ordain their own government, or to abolish or alter an existing one."

These "truths" were evidently intended for the North, but it is difficult to see why the committee thought it necessary to include such. A similar reply, they asserted, could be made to any opposition which the South might make to that clause in the constitution of California which forbade slavery. "But the good sense of our brethren of the South, we trust, renders any remarks on this point unnecessary. We, as well as they, have witnessed the fanaticism of certain classes of ultra abolitionists in the states, few in number, and powerless to consummate their wicked purposes; we too have condemned the abolition gang that is waging an unholy crusade against the constitution and integrity of our glorious Union; we, too, have marked their progress, and prayed for the day when these enemies to all that Americans hold most dear should be arraigned before the tribunal of an outraged people, and forced to suffer the severities of punishment due to national crimes and treason against the constitution."

California had drawn up a constitution to establish a state government. It was true that Congress had a right to alter this and force California to remain in the territorial stage,

but the exercise of such power would be very unwise. Admission into the Union as a state was what they wanted. "Yet, whatever be the fate of our prayer, we will not despair, nor will the continued neglect of Congress shake our attachment to our country or love for our countrymen. Nor will we reproach the legislators of the Union who, in the discharge of their responsible duties, at one time leave their countrymen to the mercy of laws written in a foreign language, and unsuited to their government, and then, when these laws are overthrown by *Americans* fresh from 'the states,' and American laws and institutions established in their place, cry out against their brethren, and denounce the constitution as the work of ignorant and unworthy men, . . . we will not attempt any supplication—we need not—we would not. But we have one request which, we beg, will be deliberately and patriotically considered, that is to say, should Congress refuse to admit California as a state into the Union, we pray that their action will cease with the refusal, and that, as heretofore, they will neglect to pass any law for California. Upon the happening of this event, we will not further ask the attention of Congress to our interests, and beg that our wishes will be considered as embodied in a simple request contained in three words, *Let us alone.*"¹

The address, however, was not accepted by the Assembly. It was rejected by a vote of eighteen to nine at the evening session on April 22nd.² The attempt at old line sectionalism thus failed.

¹ *Journals of California Legislature*, 1850, 1277-83.

² *Ibid.*, 1286-87.

CHAPTER XVIII

ADMISSION TO STATEHOOD AND INFLUENCE IN THE SENATE

WHEN the Legislature adjourned on April 22nd, the people of California were by no means sure that Congress would recognize the government established on the Pacific coast; and until such recognition should take place the state could not be considered permanently organized. It will be necessary, therefore, to follow briefly the proceedings in Congress in so far as they pertain to the admission of California into the Union as a state.

The Subject Before Congress

On January 29, 1850, Clay introduced his famous compromise resolutions in the Senate, the first of which declared that "California, with suitable boundaries, ought, upon her application, to be admitted as one of the states of this Union, without the imposition by Congress of any restriction in respect to the exclusion or introduction of slavery within those boundaries."¹ Although Clay had requested members of the Senate to give some time to considering his resolutions before discussing them, and even fixed a day for their special consideration, his colleagues were not willing to let the subjects pass without immediate objections. Rusk of

¹ *Journal of the Senate*, 1st sess., 31st. Cong., 118; *Cong. Globe*, 1st sess., 31st. Cong., pt. I, 244; Von Holst, *Constitutional History of the United States*, III, 484; Rhodes, *History of the United States*, I, 122.

Texas, Foote and Davis of Mississippi, and Mason of Virginia objected in turn. Foote immediately answered Clay's eight resolutions with eight objections. In these he expressed his willingness to admit all of California north of 36 degrees, 30 minutes as a free state, providing a "new slave state can be laid off within the present limits of Texas."¹ The discussion was renewed February 5th and 6th, and during the rest of the month it was before the Senate almost every day.²

On February 13th, President Taylor forwarded to both Houses of Congress copies of California's constitution which had been given to him by Gwin.³ Douglas moved that the message and accompanying papers be referred to the committee on territories, but withdrew his motion when Benton suggested that Clay be given the opportunity for moving the appointment of a special committee to consider the subject. Despite the urgent requests from Benton, however, Clay refused to make the motion. The senator from Missouri⁴ then moved the appointment of such a committee, of which Clay was to act as chairman. Foote objected because he proposed to offer a resolution during the day which would include the consideration of the subject under dis-

¹ *Cong. Globe*, 1st. sess., 31st Cong., pt. I, 244-52.

² See *Ibid.* under following dates: February 8, 11, 12, 13, 14, 18, 19, 24, 25 and 28. The famous speeches of Clay, Calhoun and Webster on the compromise measures were made respectively on January 29th, March 4th and March 7th.

³ *Journal of the Senate*, 1st sess., 31st Cong., 151; *Journal of the House*, 1st sess., 31st Cong., 529.

⁴ Benton was especially interested in procuring the admission of California into the Union. Of course it is well known that his son-in-law, Frémont, was senator-elect from that state.

cussion, by a special committee.¹ At the end of the day's session he offered a resolution to refer the message and accompanying papers to a select committee of fifteen to be chosen by ballot, whose duty it should be to consider the same; "and also to take into consideration the various propositions now before the Senate relating to the same subject, in connection with the question of domestic slavery in all its various bearings; and to report, if they found it practicable to do so, a plan for the definite settlement of the present unhappy controversy, and rescue from impending perils the sacred Union itself."² The Senate adjourned, however, without taking action on the subject.

On the 28th of February, another set of compromise resolutions was submitted by Bell of Tennessee. Each of the nine resolutions was accompanied with arguments in favor of its adoption. The sixth provided that "the constitution recently formed by the people of the western portion of California, and presented to Congress by the President . . . , be accepted, and that they be admitted into the Union as a state upon an equal footing in all respects with the original states." And the ninth provided that the committee on territories "be instructed to report a bill in conformity with the spirit and principles of the foregoing resolutions."³

The principal objections offered to the admission of California, according to Bell, were (1) that the boundaries in-

¹ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 355.

² *Ibid.*, 356; *Journal of the Senate*, 1st sess., 31st Cong., 151.

³ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 436-39; *Journal of the Senate*, 1st sess., 31st. Cong. 184-85.

cluded in her constitution embraced too much territory, (2) the "manner in which the constitution was framed" was irregular, (3) many of the residents of California were not citizens of the United States, (4) that the constitution "was framed under the exercise of an improper influence on the part of the President of the United States."

So far as the boundaries were concerned, Bell did not think them too extensive. He even wished that they had included the country around the Great Salt Lake. In answer to the second objection, he said it should be remembered that the constitution was satisfactory to the inhabitants of California. It was not acceptable to him or to the South generally in one particular (the slavery question), but he thought that Congress would have to concede that point because the people of California wished them to do so. The third objection he thought was not well founded. It was true that there were many foreigners and transients in California, but there was also a class of permanent inhabitants, excluding Mexicans, and they were the ones who drew up the constitution which had been submitted by that state. And coming to the last objection, he said that he had seen no evidence to sustain it. "The initiative in the formation of that constitution was taken before any message or even any ship arrived from the United States conveying a message from the President; before any intelligence had reached their shores as to what were the opinions and policy of the President upon that subject." ¹

¹ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 438. Bell's resolutions, like Clay's, were discussed at frequent intervals in the Senate up to the time of the appointment of the committee of thirteen.

Nearly a month later, March 25th, Douglas, on behalf of the committee on territories, submitted a bill for the admission of California into the Union, and another for the establishment of territorial governments in Utah and New Mexico, "and for other purposes."¹ It came up again as a result of a motion made by Benton on April 18th, but was immediately tabled on the motion of Clay.² On the following day it was again brought forward, read a second time, and made the order of the day for Monday, May 6th.³ It did not come up on the appointed day, however, but was evidently placed aside temporarily to give place to another bill then being prepared by the committee of thirteen, and submitted by them two days later. It will be necessary, therefore, to go back a little and consider the appointment and work of this committee.

The Committee of Thirteen Appointed

On December 27, 1849, Foote offered a resolution as follows: "That it is the duty of Congress, at this session, to establish suitable territorial governments for California, for Deseret, and for New Mexico."⁴ When this resolution was up for consideration on February 25, 1850, Foote moved "that that resolution be taken up for the purpose of being referred to a committee of thirteen,—six of whom to be

¹ *Journal of the Senate*, 1st sess., 31st Cong., 234; *Cong. Globe*, 1st sess. 31st Cong., pt. I, 592.

² *Journal of the Senate*, 1st sess., 31st Cong., 234.

³ *Ibid.*, 292.

⁴ *Ibid.*, 34.

selected from the slave states and six from the free states, and one to be chosen by these twelve,—with instructions to take upon themselves the duty of endeavoring to procure a compromise embracing all the questions now arising out of the institution of slavery.”¹ Hale of New Hampshire offered an amendment as follows: “Securing to the inhabitants of those territories all the privileges and liberties secured to the inhabitants of the North-west territory by the ordinance of July 13, 1787.”² These resolutions were passed over informally at the morning session, but in the afternoon Foote requested permission to renew his motion when the Senate took up consideration of the compromise resolutions offered by Clay on January 29th preceding.³ Foote explained that the acceptance of his resolution need not interfere with the discussion of the compromise measures before the Senate, and with the bill for the admission of California. He also strongly intimated that unless it were accepted within a week, a dissolution of the Union would result.⁴ His attention was called to the fact that Hale’s amendment was first in order, and as Hale was absent from the Senate, the subject was postponed. On March 5th, Foote gave notice that he intended to “press very earnestly” his recom-

¹ *Cong. Globe*, 1st sess., 31st Cong., pt. I, p. 416. As quoted on p. 418 the wording is somewhat different.

Von Holst, *Constitutional History of the United States*, III, 490, says that Foote moved the appointment of this committee on February 21st. The mistake is probably due to the fact that he saw the incorrect date, a printer’s error, of “February 21” on p. 418 of the *Globe*.

² *Ibid.*, 418.

³ *Ibid.*

⁴ *Ibid.*

mendation for the appointment of the committee of thirteen after Webster had delivered his address on March 7th.¹ The day following that speech he brought forward his motion and attempted to have Bell's resolutions included for the committee's consideration. Again, however, the motion failed to come before the Senate.² On March 12th, Foote pushed his motion vigorously as he had promised to do on the preceding day, but it was objected to and discussed by various senators until time to proceed with the business of the day, when it was again postponed. He succeeded, however, in having it made the order of the day for March 13th.³

On that day it came up at the appointed time, but was amended by Benton so as to prevent such a committee from considering the admission of California.⁴ Again the senators made long speeches and discussed things not connected with Foote's motion or Benton's amendment, and the subject was postponed.⁵ This procedure continued for over a month.⁶ On April 11th and 17th, Foote's motion was blocked by Benton, who was persistent in his effort to prevent such a committee from connecting the admission of California with any proposal that would "require the assent of any other state to its completion."⁷ Finally on April 18th, after Benton had submitted fourteen resolutions and re-

¹ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 461.

² *Ibid.*, 496.

³ *Ibid.*, 508-510.

⁴ *Ibid.*, 517.

⁵ *Ibid.*, 517-21.

⁶ *Ibid.*, 527, 565, 587, and 617.

⁷ *Journal of the Senate*, 1st sess., 31st Cong., 276-77, 289-90.

quired the yeas and nays on each one separately,¹ it was ordered that "the resolutions submitted by Mr. Bell . . . together with the resolutions submitted . . . by Mr. Clay, be referred to a select committee of thirteen: *Provided*, That the Senate does not deem it necessary, and therefore declines, to express in advance any opinion, or to give any instruction, either general or specific, for the guidance of the said committee." ² On the next day, the Senate proceeded by ballot to appoint the following men on the committee of thirteen: Clay, chairman, Dickinson, Phelps, Bell, Coss, Webster, Berrien, Cooper, Downs, King, Mangum, Mason, and Bright.³ Once more Benton attempted to prevent the committee from connecting the question of California's admission with any other subject, but his motion was passed over.⁴

The Committee's Report

This committee gave a report on May 8th. After some general remarks on the various topics, they rendered their report on the following subjects: California, the territory of Utah, the territory of New Mexico, proposition to Texas, fugitive slaves, and the slave trade in the district of Columbia.⁵ While the report was given under these six headings, the committee recommended combining the first four

¹ *Journal of the Senate*, 1st sess., 31st Cong., 292-99.

² *Ibid.*, 299.

³ *Ibid.*, 301; *Cong. Globe*, 1st sess., 31st Cong., pt. I, 780.

⁴ *Ibid.*

⁵ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 947-48.

"in order more certainly to secure" the establishment of territorial governments in Utah and New Mexico.¹ It is the purpose of this work, however, to deal with only that part of the report which pertains to the admission of California.

In their general remarks the majority of the committee recommended the admission of California. Any "irregularity by which that state was organized without the previous authority of an act of Congress ought to be overlooked, in consideration of the omission by Congress to establish any territorial government for the people of California, and the consequent necessity which they were under to create a government for themselves best adapted to their own wants." It might have been better, the committee continued, to have assigned the state a more limited front on the Pacific, but the boundaries proposed in the constitution did not embrace a "very disproportionate quantity of land adapted to cultivation" and should therefore be accepted. If, after further explorations of the territory, an increase of her population and "an ascertainment of the relations which may arise between the people occupying its various parts," it should be found necessary to form a new state in California, they believed it could be done without much difficulty.

The bill of admission provided that California should immediately become one of the states of the Union. It was to have two representatives in Congress until the census was taken, when a more accurate apportionment could be made. The admission was to be "upon the express condition that the people of said state, through their Legislature

¹ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 945.

or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States; and in no case shall non-resident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost or duty therefor: *Provided*, That nothing herein contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the Convention which formed the constitution of the state:" It further provided for the enforcement of all United States laws not "locally inapplicable."¹

The Bill Passes

This was the part of the California bill—the so called omnibus bill—dealing with the admission of that state into the Union. The exact title was "A bill to admit California as a state into the Union; to establish territorial governments for Utah and New Mexico; and making proposals to Texas for the establishment of her western boundaries."²

¹ *Cong. Globe*, 1st sess., 31st Cong., pt. I, 947.

² *Journal of the Senate*, 1st sess., 31st Cong., 327. This was senate bill No. 225.

It was discussed at frequent intervals in the Senate from the time of its introduction until August 1st. By that time it was found to be impossible to get a majority of the Senate to support all the measures of the bill when taken collectively; so the title was changed to "an act to establish a territorial government for Utah."¹ On the preceding day, Douglas had again brought forward the bill for the admission of California proposed by the committee on territories on March 25th.² It had been left unconsidered since April 19th, the expectation being that the committee of thirteen would provide a satisfactory bill for the admission of California.

Douglas's bill was discussed in the Senate on August 2nd, and Foote tried in vain to amend it by establishing the Missouri compromise line as the southern boundary.³ While the bill was under discussion on August 6th, a similar amendment proposed by Turney was rejected.⁴ Four days later, August 10th, Yulee proposed to amend the bill by practically substituting another which would establish two territories, one to be known as California and the other as South California, the line of division to be 36 degrees, 30 minutes. The government which had been established in California was to be recognized as territorial, and provision was made for calling a convention and establishing a state government. The proposal was rejected, however, by thirty-five to twelve.

¹ *Journal of the Senate*, 1st sess., 31st Cong., 518.

² *Ibid.*, 517.

³ *Ibid.*, 520.

⁴ *Ibid.*, 530.

This was followed by a proposed amendment offering exceptionally liberal land grants to California, providing she would accept the line of 36 degrees, 30 minutes as her southern boundary. The proposal was rejected by twenty-nine to thirteen.¹ A similar attempt to restrict the boundaries failed on August 12th, and the next day the bill passed the Senate by thirty-four to eighteen.²

Senate bill 169 was sent to the House of Representatives August 14th.³ On September 7th, it came before the House for discussion. Here, too, a vain attempt was made to confine the southern boundary to the Missouri Compromise line, and the bill was then passed by one hundred and fifty to fifty-six.⁴ Two days later, September 9th, the President signed it.⁵ The bill passed was practically the same which had been proposed by the committee of thirteen,⁶ and which is given above.⁷

How did California's Admission Affect the Comparative Representation of North and South in the Senate?

There were, according to Professor C. E. Persinger, three distinct groups of democrats in 1844.⁸ They were the south-

¹ *Journal of the Senate*, 1st sess., 31st Cong., 546-551.

² *Ibid.*, 553 and 557.

³ *Journal of the House*, 1st sess., 31st Cong., 1264.

⁴ *Ibid.*, 1423.

⁵ *Ibid.*, 1438.

⁶ Minot, *Public Laws of the United States*, 1st sess., 31st Cong., 452-53.

⁷ News of the admission reached San Francisco on the morning of October 18th, and on the 29th the event was formally celebrated in Portsmouth square. Bancroft, *History of California*, VI, 347-48.

⁸ See Professor Persinger's article on "The 'Bargain of 1844' as the origin

ern led by Calhoun; the northern under the leadership of Van Buren; and the northwestern which wavered between Cass, Douglas, and Allen. The first was recognizedly proslavery and proslave soil. The second was antislavery and free soil, and was about to unite with the liberty party to form the free soil party of 1848. The third was also antislavery and free soil, but was moderate in its views. It was willing to see slave soil increased providing an equal, or more than an equal amount of free soil was added to the North. Hence when the South clamored for Texas, the Northwest declared itself willing to assist in the acquisition, providing the South would use its influence to assist the Northwest in securing Oregon. This explains the origin of the "Oregon and Texas plank" in the democratic platform, and the "bargain of 1844."

Texas was brought into the Union under this agreement in 1845 but after the acquisition of Texas the South refused to fulfill its part of the bargain. This refusal, according to the authority already quoted, led to the introduction of the Wilmot proviso in the summer of 1846, the suggestion having originated with a northwestern democrat, Brinkerhoff of Ohio.¹ Thus the northwestern democrats, in retaliation for what they considered a breach of faith on the part of the South, attempted to prevent the latter from extending slavery over a territory which the South expected to procure for that very purpose.

of the Wilmot Proviso" in the Annual Report of the American Historical Association, 1911, Vol. I, pp. 189-95.

¹ *Ibid.*

Does this opposition of the Northwest to the South manifest itself in the compromise of 1850? Not on each of the measures which made up the compromise, but it must be remembered that the South itself was not united on all of these. Indeed there were only four senators who voted for all the measures in the Senate.¹ So far as the opposition concerned the admission of California, however, there is no question. The northwestern democrats gave all the votes cast from that section in both Houses in favor of admission.² To say they would have cast their votes against admission if the bargain of 1844 and the Wilmot proviso had not been incidents in the relations of the two sections, would of course be making an assertion which can not be proven. It is possible, however, if the southern wing of the democratic party had been in the hands of a skilful political leader during the period from 1844-1850, that California's admission might have been prevented.

But did the South lose its influence in the Senate by the admission of California?

Of the twenty-four states in the Union after the admission of Maine and Missouri in 1820, twelve were slave and twelve were free. The admission of Arkansas in 1836 gave the slave states a majority in the Senate, but this was offset by the admission of Michigan in 1837. In 1845 the South secured two more states—Florida and Texas. Again, however, the North gained equal representation through the admission

¹ Rhodes, *History of the United States*, I, 183.

² See U. S. Senate and House Journals, 1st sess., 31st. Cong., under the dates of August 13th and September 7th respectively.

of Iowa in 1846 and Wisconsin in 1848. The balance of power in the Upper House of Congress, therefore, was to be determined by California. The attitude which the state had taken towards slavery in its constitution afforded sufficient reason for expecting it to send anti-slavery members to the Senate. This, however, it did not do.

The first Legislature of California, as we have seen already, was composed largely of men who had come to the Pacific coast from northern states. They knew something of the struggle which Congress was having over the slavery question, and in order to appease southern opposition to some extent, elected one proslavery representative—Gwin—and one antislavery member—Frémont. The latter's term expired on March 4, 1851, and he spent the winter of 1850-51 in California trying to secure reelection. The Legislature, however, did not agree on a successor until January, 1852, when John B. Weller was chosen to succeed Frémont. Weller was a proslavery democrat from Ohio.

Thus California, a state that had voted unanimously against slavery while drawing up a state constitution, elected proslavery men to the Senate of the United States.

CHAPTER XIX

STATISTICS ON CALIFORNIA IN 1850

WHAT was the population of California in 1850? What per cent was composed of recent immigrants? How were the people distributed over the state? What different professions and occupations were represented? Answers to these questions will be attempted in this chapter, and some data will be given on the wealth and on the meager educational and religious advantages afforded in the new state at the time of its admission into the Union. The information has been collected entirely from the United States census for 1850, unless otherwise indicated.¹ These reports, in so far as they pertain to California, are incomplete in some respects and are doubtless inaccurate in others, but the data there given is the most reliable to be obtained on the subject for the period treated.

Population

In the summer of 1850, the total population of California, excluding Indians, was 92,597 plus the population of San Francisco, Contra Costa, and Santa Clara counties. The returns from the first were destroyed by fire, and those of the last two were lost. These three were not as thickly

¹ See the Seventh Census of the U. S., pp. 966-85.

populated in 1850 as some of the other counties farther east, but undoubtedly they contained enough to bring the total up to 100,000 people.¹

Of the 92,597 people given in the seventh census, 91,635 were white and 962 were colored. Divided according to sex the men numbered 84,708 whites and 872 colored; and the women 6927 and 90 whites and blacks respectively. The six counties containing the largest white population were El Dorado, with 19,908; Calaveras, 16,802; Yuba, 9607; Sacramento, 8875; Tuolumne, 8288; and Mariposa, 4184. The six containing the largest colored population were the following: Sacramento county, 212; Mariposa, 195; El Dorado, 149; Calaveras, 82; Yuba, 66; and Tuolumne, 63. In other words 68,431, or more than seventy-three per cent, of the total 92,597 people were living in or just east of the Sacramento and San Joaquin valleys.² That they were

¹ The *Annals of San Francisco* (page 301) gives to that city a population of about 25 or 30 thousand. This is undoubtedly too large, however. San Francisco's population was so shifting at this period that it is almost impossible to get a correct estimate. The directory issued in September, 1850, contained 2500 names, and the votes cast in the following October reached 3440. Bancroft, *Hist. of Calif.*, VI, 168, note 14. The same authority gives the population for January, 1848, as 800; in February, 1849, it had reached 2000, and in August of the same year, 6000. During the winter of 1849-50 about 14,000 miners came in for the winter. *Ibid.*, 6 and 168. The state census for 1852 gives San Francisco county 36,154; Contra Costa, 2786; and Santa Clara, 6764. *Seventh Census of U. S.*, 982.

² Only ten of the twenty-seven counties in the state are given in subdivisions in the Census reports. These were El Dorado, Los Angeles, Monterey, Napa, Sacramento, Solano, Sutter, Trinity, Yolo, and Yuba. The two largest towns in these counties were Sacramento City with a population of 6820 and Placerville with 5632. Only seven other towns in the ten counties had populations of more than 1000. *Seventh Census of the U. S.*, 970-71.

actually living there is indicated by the fact that more than seventy-six per cent of the number of families and more than seventy-two per cent of the number of dwellings in the state were in the counties named.

Comparatively few of the white population—7696—were born in the state; 61,866 were natives of other states of the Union; 21,629 were born in foreign countries; and the nativities of 444 were not reported. Sixty-nine of the colored population were born in the state; 709 were born in other states of the Union; 173 in foreign countries and the nativities of eleven were not reported. That is, 84,377 or more than ninety-one per cent of the 92,597 people reported were born outside of the state. Of course a very much larger per cent of the women than of the men were natives of California. There were 273 births and 905 deaths reported for the year ending June 1.

Professions and Occupations

Two hundred and fifty-five different professions, occupations, and trades were filled by 77,631 men. By far the largest number of these—57,797—were miners. Next in numerical order were 3284 merchants—not including many grocers, clothiers, etc.—, 2410 traders, 2159 laborers, 1486 farmers, and 1172 carpenters. The leading professions were represented as follows: physicians (not including three surgeons) 626; lawyers, 191; engineers, 53; “professors” and teachers, 21 and 17 respectively; clergymen, 36; dentists, 20; actors, 14. Among other professions, trades, and occupa-

tions were 46 musicians, 7 editors, 2 students, 18 surveyors, 2 undertakers, 38 manufacturers, 199 packers, 457 "black and white smiths," 526 clerks, 413 cooks, 598 inn keepers, besides watchmakers, tanners, millwrights, machinists, masons, and many others.

Farm Lands, Produce, and Live Stock

There were 32,454 acres of improved, and 3,861,531 acres of unimproved farm land in the state valued at \$3,874,041. More than eighty-three per cent of these lands (estimating in cash value) were located in those counties along the coast; while fifty-six per cent were to be found in Monterey (\$900,399), Santa Barbara (\$745,032), and Los Angeles (\$649,900) counties alone. The farming implements and machinery were estimated at \$103,483.

For the year ending June 1, the produce was as follows: 17,328 bushels of wheat, 12,236 bushels of corn, 1000 pounds of tobacco, 5520 pounds of wool, 2292 bushels of peas and beans, 9292 bushels of white potatoes, 1000 bushels of sweet potatoes, 9712 bushels of barley, \$17,700 worth of orchard products, 58,055 gallons of wine, \$75,275 worth of market garden products, 705 pounds of butter, 150 pounds of cheese, and 2038 tons of hay. Los Angeles county produced all of the tobacco, 5926 bushels of the wheat, 8391 bushels of the corn, 3440 bushels of the barley, 57,355 gallons of wine, and \$6550 worth of garden products. Santa Barbara county produced most of the butter—655 pounds—, 4790 pounds of the wool, 3065 bushels of corn, and 2602 bushels of

wheat. Of the \$17,700 worth of orchard products, Sonoma county produced \$13,000. All of the sweet potatoes were raised in Sutter county. Sacramento county furnished \$41,000 worth of market garden produce, 7500 bushels of wheat, 900 bushels of potatoes, and 1780 tons of hay.

Schools and Churches

Five thousand two hundred and thirty-five of the total adult population were unable to read and write.¹ Of these 2318 were natives and 2917 were foreign born.² There were two so called public schools, one at Santa Barbara with one teacher, twelve pupils, and an endowment of \$3600; and the other in Sonoma county with one teacher and thirty-seven pupils. The six "academies and other schools" reported were similar in character to the public schools. Two of the former were in Napa county and one each in Sacramento, Santa Barbara, San Joaquin, and Solano counties. They contained an enrollment of 170 pupils, and the total annual income from endowment and other sources was \$14,270.

The Roman Catholics had the largest number of churches, eighteen, with church property valued at \$233,500. The Methodists, Presbyterians, Baptists, and Episcopalians had five, three, one, and one respectively with property valued at \$18,300, \$11,000, \$5,000, and value not reported. The

¹ There were in the state about 12,000 under twenty years of age, of whom about 5000 were under fifteen.

² There were four daily and three weekly newspapers in the state, with circulations of 2000 and 2600 respectively. *Seventh Census of the U. S.*, 979.

Catholics were located in the counties as follows: six churches in Santa Barbara, four in Monterey, three in Los Angeles, and one each in Marin, Sacramento, Santa Cruz, San Joaquin, and Sonoma counties. Three of the Methodist churches were in Sacramento, and one each in San Joaquin and El Dorado counties. Sacramento, San Joaquin, and Solano counties each contained one Presbyterian church; while both the Baptist and Episcopalian were in Sacramento county. All the protestant churches, with the possible exception of one Presbyterian, were in the thickly populated area, while sixteen of the Catholic denomination were strung along the sea coast from Los Angeles to Sonoma county.

Thus the churches and farms of the state were confined, for the most part, to the old settlements along the coast, while by far the largest per cent of the population were to be found where the gold fields lay.

CONCLUSION

OF the ninety per cent of the population born outside of the state doubtless more than seventy-five per cent had been in California less than two years. The predominating element was of course American. In their home states they had been whigs and democrats, northerners and southerners, proslavery and antislavery advocates, but in California they forgot their parties and their sections. Whatever their opinions had been on the subject, in California they determined that slavery should not be introduced. There was no form of sectionalism in the state that would preserve this institution.¹ Even the entrance of the free negro was opposed by antislavery and proslavery men alike when they expected that he would become a co-worker with them in the mines; and his free admission into the state was finally secured through the coöperation of men who in their home states had been bound by opposing sectional environments. If southern men in the convention of 1849 ever attempted to form a clique for the purpose of saving a part of California for slavery, there is no indication of it in the proceedings of that body. There was apparently no more union among men from southern states than among those who came from the North. Old interests created by old environments were replaced by new interests produced by new conditions, and

¹ See Prof. MacDonald's little volume, *From Jefferson to Lincoln*, p. 141.

these caused northerner and southerner to unite against those whom they had formerly supported. The fact that the state did permit itself to extend sympathy to the slavery agitators of the Union soon after its admission was doubtless due to the influence of politicians—or should it be politician? For certainly the student of this early period has occasion for feeling that California's history during the fifties might have been different if Gwin had not been sent to Washington amidst the old proslavery surroundings of former days.

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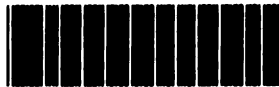
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